

**PREFERENCING EDUCATIONAL CHOICE: THE CONSTITUTIONAL LIMITS**

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ABSTRACT

Rapidly expanding charter and voucher programs are establishing a new education paradigm in which access to traditional public schools is no longer guaranteed. In some areas, charter and voucher programs are on a trajectory to phase out traditional public schools altogether. This Article argues that this trend and its effects violate the constitutional right to public education embedded in all fifty state constitutions.

Importantly, this Article departs from past constitutional arguments against charter and voucher programs. Past arguments have attempted to prohibit such programs entirely and have assumed, with little evidentiary support, that they endanger statewide education systems. Unsurprisingly, litigation and scholarship based on a flawed premise have thus far failed to slow the growth of charter and voucher programs. Without a reframed theory, several recently filed lawsuits are likely to suffer the same fate.

This Article does not challenge the general constitutionality of choice programs. Instead, the Article identifies two limitations that state constitutional rights to education place on choice policy. The first limitation is that states cannot preference private choice programs over public education. This conclusion flows from the fact that most state constitutions mandate public education as a first-order right for their citizens. Thus, while states may establish choice programs, they cannot systematically advantage choice programs over public education. This Article demonstrates that some states have crossed this line.

The second limitation that state constitutions place on choice programs is that their practical effect cannot impede educational opportunities in public schools. Education clauses in state constitutions obligate the state to provide adequate and equitable public schools. Any state policy that deprives students of access to those opportunities is therefore unconstitutional. Often-overlooked district level data reveals that choice programs are reducing public education funding, stratifying opportunity, and intensifying segregation in large urban centers. Each of these effects represents a distinct constitutional violation.

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# PREFERENCING EDUCATIONAL CHOICE

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## INTRODUCTION

The rapid expansion of charter and voucher programs is fundamentally changing the modern education paradigm. In some areas, these choice programs are re-defining, and indeed phasing out, traditional public education. The public schools in New Orleans, for instance, entirely disappeared in 2014, with an independent charter-school system replacing the centuries-old public system.<sup>1</sup> Last year, the public school systems of Detroit and Flint became majority-charter, with a host of major school districts in other states set to follow.<sup>2</sup> In addition to charter programs, voucher programs have entered a new era of vast expansion. The voucher programs in Florida and Indiana more than quadrupled between 2008 and 2015.<sup>3</sup> In the past two years, Arizona and Nevada enacted voucher programs that would authorize every student in the state to enroll in a private school at public cost.<sup>4</sup> Now, the federal government is proposing an even more radical change that would affect the entire nation. The Trump administration's proposed budget would make states ineligible for federal funding increases unless they change their laws to allow students to spend the entirety of state, local, and federal education funds on a school of their choice.<sup>5</sup>

Public school advocates have long feared that if charters and vouchers ever gained a strong foothold in public policy, they would erode the stability of public education itself.<sup>6</sup> Yet, save a few outlier cases, advocates have failed to persuade courts to halt the choice programs.<sup>7</sup> They have argued that state constitutions bar these choice programs altogether. More specifically, they have asserted that education clauses of state constitutions prohibit states from funding or creating anything other than traditional public schools. Most courts have rejected this argument outright, reasoning that charters schools are public schools and states retain the discretion to offer vouchers as an alternative to the public system.<sup>8</sup> In those few cases where public-school advocates prevailed, states simply created funding

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<sup>1</sup> Lyndsey Layton, *In New Orleans, Major School District Closes Traditional Public Schools for Good*, WASH. POST, May 28, 2014.

<sup>2</sup> NAT'L ALL. FOR PUB. CHARTER SCHS., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES AND THEIR IMPACT ON STUDENT OUTCOMES (2016), <http://www.publiccharters.org/wp-content/uploads/2016/11/enrollment-share-web1128.pdf>; see also Emma Brown, *D.C. Council Members Fear Schools Near Tipping Point as Students Flee System*, WASH. POST, Jan. 23, 2013.

<sup>3</sup> See *infra* notes and accompanying text.

<sup>4</sup> See *Schwartz v. Lopez*, 382 P.3d 886, 892 (Nev. 2016); Yvonne Wingett Sanchez & Rob O'Dell, *Arizona Is Expanding Its School-Voucher Program. What Does It Mean for Parents?* AZCENTRAL.COM, Apr. 20, 2017, <http://www.azcentral.com/story/news/politics/arizona-education/2017/04/20/arizona-expanding-its-school-voucher-empowerment-scholarship-account-program-now-what/100352304/>.

<sup>5</sup> WHITE HOUSE, BUDGET OF THE U. S. GOVERNMENT, A NEW FOUNDATION FOR AMERICAN GREATNESS FISCAL YEAR 2018.

<sup>6</sup> See generally Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257 (1999); James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547 (2007).

<sup>7</sup> See Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 947 (2007).

<sup>8</sup> See, e.g., *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999); *Meredith v. Pence*, 984 N.E.2d 1213, 1221–25 (Ind. 2013).

mechanisms to avoid the problems that courts had identified.<sup>9</sup> In short, constitutional doctrine has largely failed to constrain the expansion of choice programs.

The flaw in these early cases was that they claimed too much. They lacked the evidence to establish these choice programs would actually undermine public education. Instead, advocates for traditional public education launched attacks premised on the notion that choice programs were inherently antithetical to the public education system. Courts, understandably, were unwilling to concur in such a bold claim—a claim that would halt experimentation before it even began.<sup>10</sup> Whatever the merits of those early claims, a constitutional doctrine has now solidified: states may create and fund choice programs.<sup>11</sup> Revisiting the now well-established doctrine is a futile effort.

Yet, all doctrine is capable of evolution and nuance. The failure to pursue them allows the harmful effects of choice to continue unabated—harms that demand a response. This Article offers that response. The response requires a reframing of both the facts and legal theories surrounding the issue. The facts that matter most are not statewide, but local. Choice programs appear small at the state level and have little to no effect on most school districts.<sup>12</sup> Complaining about these effects is unreasonable. A narrowed focus reveals that the effects of statewide policy are concentrated in particular urban districts.<sup>13</sup> From the perspective of the local urban district, the effects range from existential threats to serious impediments to equal and adequate education.

In Newark, New Jersey, for instance, the state's arcane system of funding charters produces a funding deficit in the school district with each student who transfers to charter.<sup>14</sup> To be clear, the Newark school district does not just lose its state funding for those students to the charter school; rather, the state requires the district to send charters an amount in excess of what the district received from the state.<sup>15</sup> This funding mechanism, then, clearly decreases funds available for students remaining in public schools. As social science, legislative studies, and states' own statutes all confirm, the shrinking education pot and flawed charter funding mechanisms are depressing per pupil funding in several districts at a rate that can seriously depress educational opportunities and academic achievement.<sup>16</sup> In short, by developing district level data, this Article

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<sup>9</sup> Hillel Y. Levin, *Tax Credit Scholarship Programs and the Changing Ecology of Public Education*, 45 ARIZ. ST. L.J. 1033 (2013).

<sup>10</sup> See, e.g., *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999); see also Nathaniel J. McDonald, *Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution's Common School Approach*, 53 CLEV. ST. L. REV. 467, 469 (2006);

<sup>11</sup> Saiger, *supra* note 7; Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN. ST. L. REV. 43, 92 (2004).

<sup>12</sup> NAT'L CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION (2017), [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp).

<sup>13</sup> See *infra* notes and accompanying text.

<sup>14</sup> DANIELLE FARRIE & MONETE JOHNSON, EDUC. L. CTR., NEWARK PUBLIC SCHOOLS: BUDGET IMPACTS OF UNDERFUNDING AND RAPID CHARTER GROWTH 6 (Nov. 2015), <http://edlawcenter.org/assets/files/pdfs/publications/NPS%20Budget%20Impacts%20of%20Underfunding%20and%20Rapid%20Charter%20Growth.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*, 131 Q. J. ECON. 157, 162 (Feb. 2016); Christopher A. Candelaria & Kenneth A. Shores, *Court-Ordered Finance Reforms in the Adequacy Era: Heterogeneous Causal Effects and Sensitivity* (Mar.

demonstrates public school advocates' worst fears: choice is draining funds from public schools.

The legal theory that makes these facts relevant is one that accepts the established principle that states may fund choice programs, but emphasizes that no constitutional principle authorizes the state to implement those programs in ways that harm the public education system. In other words, the theory introduces limitations on choice programs without challenging their basic existence. This means states must implement choice programs in ways that, as a practical matter, do not undermine public education.

This Article examines two questions under this simple constitutional test for choice programs. First, it examines whether states may create statutory preferences for private education. Second, it examines whether choice programs actually cause educational deprivations in particular school districts that would rise to the level of a constitutional violation.

As to the first question, states may not favor choice programs over the traditional public education systems. This limitation flows from the fact that education holds first-order status in most state constitutions and is an absolute obligation in others.<sup>17</sup> This should be interpreted to mean that states cannot systematically advantage choice programs in relation to public education. This Article's close examination of statutory frameworks reveals states are crossing this line in a variety of ways: funding, oversight, student and teacher rights, and enrollment practices. Legislative preferences for charters are so strong that charters can, for instance, engage in business deals that would constitute fraud if carried out by traditional public schools.<sup>18</sup> Similarly, with vouchers, states simply turn over students and money with almost no strings attached.<sup>19</sup> Voucher schools remain free to discriminate, minimize special education services, squelch free speech, and expel students.<sup>20</sup> States do not even demand increased academic achievement in return.

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21, 2017), <https://cepa.stanford.edu/sites/default/files/cofr-efp.pdf>; LEGIS. DIV. OF POST AUDIT STATE OF KANSAS, COST STUDY ANALYSIS: ELEMENTARY AND SECONDARY EDUCATION IN KANSAS: ESTIMATING THE COSTS OF K-12 EDUCATION USING TWO APPROACHES (2006), <http://www.kslpa.org/assets/files/reports/05pa19a.pdf>.

<sup>17</sup> See, e.g., FLA. CONST. art. IX, § 1 ("The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders."); GA. CONST. art. VIII, § 1, ¶1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia, . . . [the expense of which] shall be provided for by taxation."); NEV. CONST. art. XII, § 6 (requiring the state to fund education before any other program).

<sup>18</sup> Preston C. Green et al., *Are Charter Schools the Second Coming of Enron?: An Examination of the Gatekeepers That Protect Against Dangerous Related-Party Transactions in the Charter School Sector*, 93 IND. L.J. (forthcoming 2018); see also Thomas A. Kelley III, *North Carolina Charter Schools' (Non-?) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. REV. 1757 (2015) (concluding that charters while claiming non-profit status, likely do not meet the federal criteria, but are being allowed to claim as much under North Carolina law).

<sup>19</sup> See generally NAT'L CONF. OF STATE LEGIS., SCHOOL VOUCHER LAWS: STATE-BY-STATE COMPARISON (Jan. 2014), <http://www.ncsl.org/research/education/voucher-law-comparison.aspx>.

<sup>20</sup> See, e.g., Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743 (2003); Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools "State Actors,"* 2004 U. CHI. LEGAL F. 525, 527.

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As to the second question, education clauses in state constitutions create a state duty to provide adequate and equitable public schools.<sup>21</sup> Any state policy that deprives students of access to those educational opportunities is unconstitutional.<sup>22</sup> State choice policies are no exception. The issue, then, is whether those choice policies do, in fact, cause harms to public education. The answer is demonstrably yes. District level data demonstrates that choice programs are reducing public education funding, stratifying opportunity, and intensifying segregation.<sup>23</sup> Each of these categorical effects represents a distinct constitutional violation.

This Article is particularly timely. The nation is locked in a debate over the future of education reform and choice's role in it.<sup>24</sup> While federal and state governments have implemented and discarded a variety of new education reforms over the last two decades,<sup>25</sup> choice programs have stuck and expanded. As Martha Minow aptly wrote, choice has a “seductive” allure.<sup>26</sup> At the same time, choice programs are introducing enormous risks to public education. Understandably, proponents and opponents take extreme positions on the issue, producing polemic rhetoric rather than reasoned debate.<sup>27</sup> This Article identifies a nuanced middle ground that would harmonize legitimate charter and voucher interests with the states' obligations to the traditional public education system.

In addition, each new wave of choice expansion generates a new wave of litigation. A number of lawsuits have been filed in just the last year.<sup>28</sup> These cases, however, will not stall the momentum of choice programs if the cases continue to argue that choice programs are in and of themselves unconstitutional. This Article proposes a workable means to challenge the reach of choice programs, setting practical limitations on their implementation. It also offers guidance to courts in evaluating choice programs without calling for wholesale reversals of the now-established precedent that upholds their constitutionality. In short, this Article offers a reasoned solution to the danger that choice programs pose that is consistent with existing constitutional principles.

This Article makes its argument in four parts. Part I canvases states' choice statutes, identifying the ways in which states have created advantages for choice programs in relation to traditional public schools. It also examines recent policy developments, concluding that further expansion and advantages for choice are coming. Part II reveals

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<sup>21</sup> See generally Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75 (2016) (synthesizing state constitutional doctrine on education).

<sup>22</sup> *Id.*

<sup>23</sup> See *infra* notes and accompanying text.

<sup>24</sup> See, e.g., David Leonhardt, *School Vouchers Aren't Working, But Choice Is*, N.Y. TIMES, May 2, 2017; Nicholas Kristof, *Beyond Education Wars*, N.Y. TIMES, Apr. 23, 2015.

<sup>25</sup> Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. (forthcoming 2017) (surveying the history of education reform at the federal level).

<sup>26</sup> Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 816 (2011).

<sup>27</sup> See generally Jay Mathews, *School Choice Debate v. Reality*, WASH. POST, May 31, 2011 (indicating that school choice debates are driven more by personal conclusions than research).

<sup>28</sup> See, e.g., Kristen M. Clark, *Broward Schools to Sue over Controversial New Schools Law*, MIAMI HERALD, July 5, 2017; Marj Jo Pitzl, *Arizona Legislature Leaves, and Lawsuits Start*, THE REPUBLIC, May 11, 2017; Lori Higgins, *Education Groups Sue to Stop Private School Funding in Michigan*, DETROIT FREE PRESS, Mar. 21, 2017; Kate Royals, *Judge: Local Tax Dollars Crux of Charter School Lawsuit*, MISSISSIPPI TODAY, Apr. 4, 2017.

that the effects of school choice are best understood at the district level. Its empirical analysis details how the effects of choice are concentrated in particular districts. Part II ends by identifying and categorizing the most pernicious effects of current choice programs: lowered school quality, stratification of educational opportunity, and segregation. Part III provides an overview of the constitutional principles that apply in education equity and quality cases and critically evaluates past litigation's failure to properly use them in the context of choice programs. Part IV proposes a new constitutional analysis and identifies two major limiting principles that courts should apply to choice programs.

## I. PREFERENCING CHOICE BY LAW

### A. *Charters Schools*

#### 1. *State Funding Policies*

Charter advocates have long claimed that charters are underfunded in comparison to traditional public schools.<sup>29</sup> While there may have been some truth to the claim in earlier years, states have increasingly treated charter schools very well, if not more favorably, than traditional public schools in the last decade. The complexity of school funding in any given state, along with variances between states, can obscure this point.

States follow a couple of different patterns in funding charter schools. Some fund charters directly from the state coffers, with none of the funds passing through local districts.<sup>30</sup> Others route charter funding through local school district budgets, with the districts serving as pass-through entities.<sup>31</sup> Among those that route state funds through districts, some also require district to transfer a pro-rata share of locally raised education funds to charters.<sup>32</sup> The extent to which a state reimburses local districts for the transfer of local tax dollars to charters varies.<sup>33</sup>

Notwithstanding these variances, at least three trends reveal a distinct advantage for charter schools in several states: the rate of increase or decrease in per pupil funding, inflated reimbursement rates, and phantom revenue. The rate of increase in charter funding is the most obvious. The expenditures for charter schools have steadily increased over the past several years. As the chart below reveals, for instance, Ohio charter schools received

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<sup>29</sup> See, e.g., Greg Rubio, *Surviving Rodriguez: The Viability of Federal Equal Protection Claims by Underfunded Charter Schools*, 2008 U. ILL. L. REV. 1643, 1644; Jeanette M. Curtis, Note, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1058 (2012).

<sup>30</sup> Deborah A. Verstegen & Teresa S. Jordan, *A Fifty-State Survey of School Finance Policies and Programs: An Overview*, 34 J. EDUC. FIN. 213 (2009).

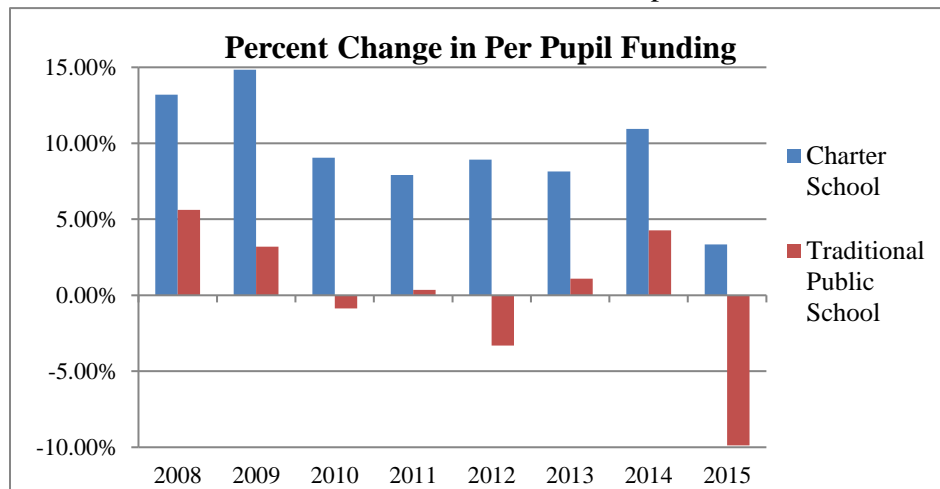
<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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substantial funding increases every year between 2008 and 2015—ranging anywhere from two to more than ten times the rate of increase in traditional public schools.<sup>34</sup>



These funding practices produced even deeper disparities when the method of charter funding is examined. Ohio filters charter money through districts, which sometimes must transfer more to charters than they actually receive per pupil from the state. In 2013–14, the base per-pupil grant to districts was \$3890, but the transfer to charters exceeded that amount and meant that statewide districts lost \$256 for every student that enrolled in a charter.<sup>35</sup> In a number of districts, the loss was much larger. In nine districts, the loss amounted to a 20% to 65% cut in per-pupil state funding for traditional public schools.<sup>36</sup> At the same time, the state funding per charter school students was \$7189 per pupil—twice the state support for traditional public-school students.<sup>37</sup>

Ohio is not unique. Similar trends occurred in several other states, just with different nuances. In Arizona and New Jersey, the state spared charter schools most of the funding cuts that the states imposed on traditional public schools during the recession. In New Jersey, the state refused to fully fund its statutory mechanism for calculating the cost of adequate educational opportunities in public schools.<sup>38</sup> Charter schools were subject to this formula as well, but the state appropriated separate funds outside the formula to ensure charters received necessary funding.<sup>39</sup> In raw dollars, charters received \$1000 to \$2000 more per pupil per year than traditional public schools in base state aid between 2013 and

<sup>34</sup> The data for this chart comes from Ohio Department of Education, Enrollment Data, <http://education.ohio.gov/Topics/Data/Frequently-Requested-Data/Enrollment-Data> and William L. Phillis, Ohio Coalition for Equity & Adequacy of School Funding, Testimony on House Bill 2, March 9, 2015, file:///C:/Users/blackdw/Downloads/Phillis\_HB2%20(2).pdf.

<sup>35</sup> INNOVATION OHIO, *SHORT-CHANGED: HOW POOR-PERFORMING CHARTERS COST ALL OHIO KIDS* (2014) [hereinafter *SHORT-CHANGED*].

<sup>36</sup> ARIZ. SENATE RES. STAFF, ARIZONA'S SCHOOL FINANCE SYSTEM 3–4 (Oct. 20, 2016), <http://www.azleg.gov/briefs/senate/arizona/s%20school%20finance%20system.pdf> [hereinafter ARIZONA'S SCHOOL FINANCE SYSTEM].

<sup>37</sup> *SHORT-CHANGED*, *supra* note 35, at 3.

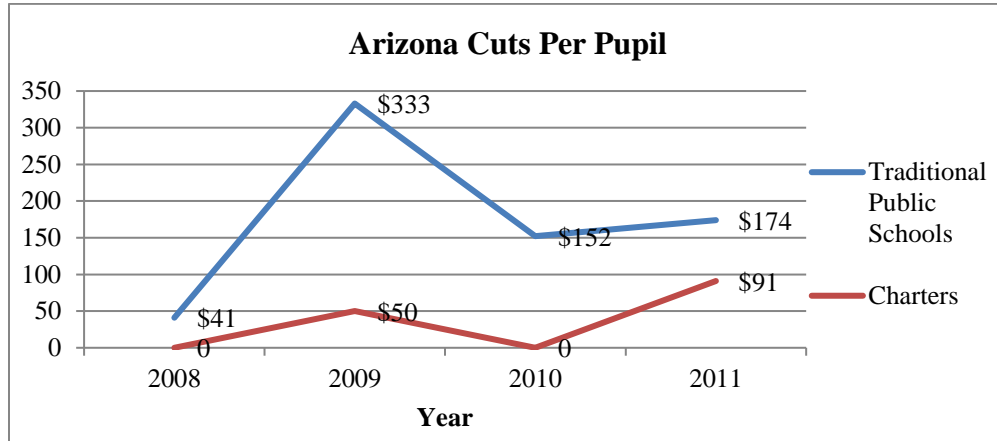
<sup>38</sup> See *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1025–26 (N. J. 2011).

<sup>39</sup> FARRIE & JOHNSON, *supra* note 14, at 6.



2106.<sup>40</sup> In short, the state sought to maintain adequate funding for charters at the time that it was depriving traditional public schools of it.

In Arizona, the state imposed similar cuts to its per-pupil formula every year between 2008 and 2011, but the cuts to traditional public schools were far larger than charters.<sup>41</sup> During those years, Arizona collectively cut a total of \$700 per pupil from traditional public schools, but only \$141 from charters.<sup>42</sup>



Like New Jersey, Arizona also found creative ways to offset the cuts that charters would have otherwise felt. One was maintaining a funding formula bump for districts with less than 600 students. Because the state treats each charter as its own district, 90% of charters fall in this category.<sup>43</sup> Another was placing a larger tax burden on local districts to offset cuts in state aid.<sup>44</sup> Since charters do not raise local taxes, they were exempted from this burden.<sup>45</sup> More obvious, the state simply directed new non-formula funds toward charters that were unavailable to traditional public schools.<sup>46</sup>

The second categorical preference for charter schools occurs in states that set charter reimbursements rates that over-compensate charters for the services they provide. Cyber charter schools—schools that provide services primarily through the internet—are the worst example. Some states fund cyber charter schools the same as brick and mortar charter schools,<sup>47</sup> even though cyber charters do not have the facilities costs of other

<sup>40</sup> *Id.* at 6–7.

<sup>41</sup> YOUSEF AWWAD, STATE OF ARIZONA, DEP'T OF EDUC., FUNDING DISTRICTS VERSUS CHARTERS (Dec. 20, 2010), <https://ade.az.gov/schoolfinance/faqs/Funding/Funding%20of%20Districts%20vs%20Charters.pdf>.

<sup>42</sup> Calculations based on finance data in *id.* and student enrolment in ARIZ. DEP'T OF EDUC., SCHOOL FINANCE, <http://www.azed.gov/finance/reports/> (last visited July 27, 2017).

<sup>43</sup> Awwad, *supra* note 41.

<sup>44</sup> ARIZONA'S SCHOOL FINANCE SYSTEM, *supra* note 36, at 3–4.

<sup>45</sup> *Id.*

<sup>46</sup> Awwad, *supra* note 41.

<sup>47</sup> PSBA EDUC. RES. & POL'Y CTR., THE COSTS OF CHARTER AND CYBER CHARTER SCHOOLS: RESEARCH AND POLICY IMPLICATIONS FOR PENNSYLVANIA SCHOOL DISTRICTS (Jan. 2014), [https://www.psba.org/wp-content/uploads/2014/09/Charter\\_School\\_Funding-White-Paper\\_Update\\_2014.pdf](https://www.psba.org/wp-content/uploads/2014/09/Charter_School_Funding-White-Paper_Update_2014.pdf) [hereinafter COSTS OF CHARTER]; INNOVATION OHIO, OHIO'S E-SCHOOLS: FUNDING FAILURE; CODDLING CONTRIBUTORS 4–5 (July 28, 2017) [hereinafter OHIO'S E-SCHOOLS].

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charter and public schools.<sup>48</sup> While cyber schools do have higher technology costs, those costs do not justify funding them at the same level as other charters.<sup>49</sup> Recognizing this problem, other states fund cyber charters at a lower level,<sup>50</sup> but the question of overcompensation still remains.<sup>51</sup> In Georgia, for instance, virtual charters' state per-pupil funding is less than other charters, but their direct per-pupil state revenue still exceeds that of traditional public schools.<sup>52</sup> The choice industry itself even recognizes the problem. Fearing the negative taint this issue and fraud may have on charters overall, the industry issued a report advocating for states to reform cyber charter funding to better account for student costs.<sup>53</sup>

Overcompensation of brick and mortar charters is harder to identify, but present nonetheless. The best documented example is in Pennsylvania. There, the state calculates charter school reimbursement rates largely based on the average per-pupil expenditures in the local school district in which the charter is based.<sup>54</sup> The problem is that district averages lump a lot of apples and oranges together, about which the state makes false assumptions.<sup>55</sup> Pennsylvania's reimbursement rate for special education students assumes that all special education students cost the same or, even if they do not, charters will enroll a diverse group of special education. Both are false.

Students with mild disabilities may only require small additional investments beyond the cost of regular education students, but a student with autism may cost multiple times more.<sup>56</sup> Pennsylvania's statutory reimbursement for special education students rate ignores this distinction and simply requires reimbursement based on averages. The reimbursement rate "does not vary based on the charter schools' actual costs or on the needs of the child."<sup>57</sup> Consider Morrisville Borough, for instance, where the reimbursement for regular education students was \$11,000 per pupil and \$42,642 for

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<sup>48</sup> COSTS OF CHARTER, *supra* note 47; OHIO'S E-SCHOOLS, *supra* note 47.

<sup>49</sup> OHIO'S E-SCHOOLS, *supra* note 47, at 6 (projecting a significant profit margin in online charters); *see also* NAT'L ALL. FOR PUB. CHARTER SCH., A CALL TO ACTION TO IMPROVE THE QUALITY OF FULL-TIME VIRTUAL CHARTER PUBLIC SCHOOLS 11–12 (June 2016) (comparing brick and mortar costs to online costs) [hereinafter CALL TO ACTION].

<sup>50</sup> *See, e.g.*, STATE CHARTER SCH. COMM'N, STATE CHARTER FUNDING, <https://scsc.georgia.gov/state-charter-funding> (last visited Aug. 4, 2017) (reducing virtual charters funding by one-third); *see generally* GREG S. GRIFFIN & LESLIE MCGUIRE, GA. DEP'T OF AUDITS & ACCOUNTS PERFORMANCE AUDIT DIV., VIRTUAL CHARTER SCHOOLS: REQUESTED INFORMATION ON VIRTUAL CHARTER SCHOOLS 33–34 (2016), <https://www.edweek.org/media/georgia%2015-11%20virtual%20charter%20final%20report.pdf>.

<sup>51</sup> OHIO'S E-SCHOOLS, *supra* note 47 (projecting a significant profit margin in online charters).

<sup>52</sup> DAVID WERNER, GCSA: GA. CHARTER SCH. ASS'N, GOVERNOR'S OFFICE PRESENTS ANALYSIS OF CHARTER SCHOOL FUNDING (Aug. 14, 2012), <http://gacharters.org/press-releases/governors-office-presents-analysis-of-charter-school-funding/>.

<sup>53</sup> CALL TO ACTION, *supra* note 49, at 6.

<sup>54</sup> 24 PA. CONS. STAT. § 17-1725-A.

<sup>55</sup> *See generally* COSTS OF CHARTER, *supra* note 47.

<sup>56</sup> AUGENBLICK, PALAICH & ASSOCIATES, N.J. DEP'T OF EDUC., ANALYSIS OF NEW JERSEY'S CENSUS-BASED SPECIAL EDUCATION FUNDING SYSTEM 6 (2011); MICHAEL GRIFFITH, GE FOUND., A LOOK AT FUNDING FOR STUDENTS WITH DISABILITIES, EDUC. COMM'N OF THE STATES 4–5 (Mar. 2015); *see also* Amanda M. Fairbanks, *Tug of War over Costs to Educate the Autistic*, N.Y. TIMES, Apr. 18, 2009, at A28.

<sup>57</sup> *Chester Upland Sch. Dist. v. Pennsylvania*, 284 F.R.D. 305, 314 (E.D. Pa. 2012).

special education students.<sup>58</sup> The latter was likely driven up because the district is relatively small and has a few extremely high cost special education students. A local charter school, however, would receive the high reimbursement no matter how small the needs of the special education students it enrolls. While the specific demographics in Morrisville are beyond the scope of this Article, research demonstrates charters do generally enroll lower-cost special education students.<sup>59</sup> Given that analogously high reimbursement rates repeat themselves across Pennsylvania,<sup>60</sup> overcompensation is likely prevalent.

Separate analysis further reveals that the special education average itself is artificially inflated. This occurs because state does not calculate the average based on the actual number of special education students in a district, but rather on the assumption that 16% of students are in special education in all districts.<sup>61</sup> In a district with more than 16%, the state's calculation method significantly inflates the average special expenditure.<sup>62</sup> The result is to then require districts to spend more on special education students in charter schools than they do on their own special education students. This phenomenon was so prevalent in Chester that the district was nearly insolvent and forced to close in 2012.<sup>63</sup>

The final categorical financial advantage for charters is the phantom revenue that charters receive when districts are required to provide services like transportation and extracurricular activities for charters. Pennsylvania statute indicates that school districts are "required to provide transportation to a charter school located up to ten miles from the school district boundary,"<sup>64</sup> which could mean beyond the district boundary. Ohio ignores district boundaries altogether and simply obligates the district to transport charter students who live within a 30-minute radius of the charter school.<sup>65</sup> Extracurricular activity rules are more straightforward: states require school districts to allow charter school students to participate in their extracurricular activities as though they were enrolled in the district.<sup>66</sup> To be clear, charter students should have access to transportation and extracurricular

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<sup>58</sup> PENN. DEP'T OF EDUC., CHARTER SCHOOL FUNDING, 2016-17 TUITION RATES, <http://www.education.pa.gov/K-12/Charter%20Schools/Pages/Charter-School-Funding.aspx#tab-1> (last visited Oct. 18, 2017).

<sup>59</sup> See, e.g., Anne E. Trotter et al, *Education Management Organizations and Charter Schools: Serving All Students*, 213 ED. LAW REP. 935, 943 (2006); MARK WEBER & JULIA SASS RUBIN, *NEW JERSEY CHARTER SCHOOLS: A DATA-DRIVEN VIEW*, PART I 21-22 (2014); Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 686-87 (2012). See also Robert J. Martin, *Charter School Accessibility for Historically Disadvantaged Students: The Experience in New Jersey*, 78 ST. JOHN'S L. REV. 327, 358 (2004)

<sup>60</sup> The reimbursement rate for regular education in the vast majority of Pennsylvania districts was between \$9,000 and \$13,000 per pupil. But the reimbursement rate for special education students in the most districts ranged from \$16,000 per pupil to the low \$30,000 range. PENN. DEP'T OF EDUC., *supra* note 58.

<sup>61</sup> *Chester*, 284 F.R.D. at 315.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 305.

<sup>64</sup> 24 PA. CONS. STAT. § 17-1701-A (2004). In Pennsylvania, if the district fails to do so, the costs the charter incurs to transport those students are transferred from the district's state funds. 24 PA. CONS. STAT. § 17-1726-A(b), (c).

<sup>65</sup> 2014 *Ohio Charter Law Guidebook*, OAPCS.ORG, Sept. 2014, [http://www.oapcs.org/sites/default/files/Ohio\\_Charter\\_Law\\_Guidebook\\_Oct\\_2014\\_Version.pdf](http://www.oapcs.org/sites/default/files/Ohio_Charter_Law_Guidebook_Oct_2014_Version.pdf).

<sup>66</sup> *Id.*; S.C. CODE, §§ 59-40-10-59-40-240 (2016).

activities. The point here is simply that the cost of those opportunities is placed on local districts, not on charters that would otherwise have to carry those costs themselves.

In sum, each of these trends represents a distinct preference for private choice. Whatever their historical access to funds, charters have seen a rate of per-pupil funding growth that far outstrips public schools. That growth has occurred even when the state has cut funds for traditional public schools and sometimes included taking it out of local district coffers. The funds that states have sent to charters, moreover, sometimes over-compensate them, allowing them to reap a financial windfall from public revenues.<sup>67</sup> This is to say nothing of the phantom revenues that charters receive through in-kind services.

## 2. Oversight, Management, and Self-Dealing

The management and oversight advantages that charter schools have are explicit in most instances. Charters, by design, are free from extensive oversight and accountability.<sup>68</sup> At the most basic level, charters do not collect the same data as public schools, make it publicly available, or have to account for it.<sup>69</sup> Therein lies the point. Education reformers have long argued that public schools are over-regulated and the key to innovation was alleviating the burden.<sup>70</sup> They irony, however, is that charter schools were freed of these so-called burdens, not traditional public schools.

Charter school accountability is largely limited to the contract that they enter into with a charter school authorizer (the entity states created or authorized to issue charters).<sup>71</sup> This contract can be as rigorous or lenient as the charters that submit it and the authorizers who accept it.<sup>72</sup> Once the authorizer grants a charter, oversight typically declines. Whereas a traditional public school remains under constant oversight from publicly elected boards, superintendents, and high-ranking state officials,<sup>73</sup> charters generally are not. The only formal checks on most charters are their self-selected board of directors and the charter authorizers. But neither the directors nor the authorizers are obligated to exercise any particular control over the charter.<sup>74</sup> Thus, as a practical matter, they exercise very little control.

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<sup>67</sup> See BRUCE BAKER & GARY MIRON, NAT'L EDUC. POLICY CTR, *THE BUSINESS OF CHARTER SCHOOLING: UNDERSTANDING THE POLICIES THAT CHARTER OPERATORS USE FOR FINANCIAL BENEFIT* (2015); See also Erik Kain, *80% of Michigan Charter Schools Are For-Profits*, FORBES (Sept. 29, 2011).

<sup>68</sup> Michael A. Naclerio, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1157 (2017).

<sup>69</sup> See, e.g., Jacey Fortin, *What's Next in the Charter Debate? Start with Better Data*, BOS. GLOBE (Nov. 15, 2016); Naclerio, *supra* note 68, at 1184-85.

<sup>70</sup> Walker Richmond, *Charter School Accountability: Rhetoric, Results, and Ramifications*, 12 VA. J. SOC. POL'Y & L. 330, 339 (2004).

<sup>71</sup> *Id.* at 340-41.

<sup>72</sup> See, e.g., Kelley, *supra* note 18, at 1802 (discussing sweeps contracts); see also Richmond, *supra* note 70, at 343-45 (discussing the ambiguity in state statutes regarding what authorizers must demand of charters).

<sup>73</sup> Placing charters outside the highest authorities in the state has created some controversy as it is not clear whether legislatures have the power to do so in some states. Washington statute; Derek Black, *New Lawsuit Argues Mississippi's Charter School Law Is Unconstitutional by Molly Hunter*, EDUC. L. PROF. BLOG (July 28, 2016), [http://lawprofessors.typepad.com/education\\_law/2016/07/new-lawsuit-argues-mississippi-charter-school-law-is-unconstitutional-by-molly-hunter.html](http://lawprofessors.typepad.com/education_law/2016/07/new-lawsuit-argues-mississippi-charter-school-law-is-unconstitutional-by-molly-hunter.html).

<sup>74</sup> Richmond, *supra* note 70, at 343-45.

Prior studies show that charter oversight is simply insufficient to ensure basic compliance with the charter and other prevailing laws.<sup>75</sup> The pressure on authorizers has been to issue more charters, not regulate the ones they have.<sup>76</sup> Even a report favorable to charters recognized that “authorizers are reluctant to actualize the accountability/autonomy exchange by closing schools for failure to meet their performance targets.”<sup>77</sup> Likewise, a legislative study of California charters found “authorizers varied widely in both the services they performed[,] the amounts they charged charter schools for oversight,”<sup>78</sup> and the extent to which they conform to “professionally-accepted standards.”<sup>79</sup> The oversight data produced by authorizers was so limited that the legislative body indicated that it could not even fully complete the study’s analysis.<sup>80</sup> As U.S. Department of Education audit found similar problems, but went further finding that two out of three charters had “internal control weaknesses” relating to “conflicts of interest, related-party transactions, and insufficient segregation of duties”<sup>81</sup> that risked “waste, fraud and abuse.”<sup>82</sup>

As hinted in these reports, charter school flexibility extends well beyond freedom from outside bureaucracies and politics. States have exempted charters from a number of basic fiscal expenditure and contracting rules that allow them to operate largely free of any ethical or business limits other than those they self-impose.<sup>83</sup> The most minor exemptions allow charters schools to run cash surpluses that school districts cannot,<sup>84</sup> or tap into districts’ rainy day funds and spend them immediately on discretionary items.<sup>85</sup> The more serious exemptions allow charters to hide their expenditures and engage in what many term as self-dealing with public funds.<sup>86</sup>

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<sup>75</sup> See, e.g., Rebecca E. Blanton, *California Charter Oversight: Key Elements and Actual Costs*, CA. ST. LIBR., Jan. 2012, at 1–2, <https://www.library.ca.gov/crb/12/12-001.pdf>; Patrick J. Howard, *Nationwide Assessment of Charter and Education Management Organizations: Final Audit Report*, ED-OIG/A02M0012, Sept. 29, 2016, <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a02m0012.pdf>.

<sup>76</sup> See Press Release, U.S. Dep’t of Educ., States Open to Charters Start Fast in ‘Race to Top’ (June 8, 2009).

<sup>77</sup> Carol Ascher et al., *Charter School Accountability in New York: Findings from a Three-Year Study of Charter School Authorizers*, INST. FOR EDUC. & SOC. POL’Y, Mar. 2003, at 3.

<sup>78</sup> Blanton, *supra* note 75.

<sup>79</sup> *Id.* at 1–2.

<sup>80</sup> *Id.* at X.

<sup>81</sup> Howard, *supra* note 75.

<sup>82</sup> *Id.* at 2. The National Association of Charter School Authorizers itself issued a 2016 report and was only willing to characterize twenty-nine states that have legal structures to promote effective oversight by authorizers. NATIONAL ASSOCIATION OF CHARTER SCHOOL AUTHORIZERS, ON THE ROAD TO GREAT CHARTER SCHOOLS: STATE POLICY ANALYSIS 2016, at 6–9.

<sup>83</sup> See generally Julia L. Davis, *Contracts, Control and Charter Schools: The Success of Charter Schools Depends on Stronger Nonprofit Board Oversight to Preserve Independence and Prevent Domination by for-Profit Management Companies*, 2011 B.Y.U. EDUC. & L.J. 1, 11–18 (2011); Green et al., *supra* note 18.

<sup>84</sup> Education Law Center, *Court Rejects Commissioner’s Decision to Allow Charters to Carry Excess Surplus Funds*, April 3, 2013, <http://www.edlawcenter.org/news/archives/nj-charter-schools/nj-charters-carrying-substantial-surplus-even-as-districts-make-cuts.html>.

<sup>85</sup> *Charter Day School v. New Hanover County*, 2014 WL 619562 (2014); *Northeast Raleigh Charter Academy v. Wake County*, 2014 WL 640976 (2014).

<sup>86</sup> Green et al., *supra* note 18.

## PREFERENCING EDUCATIONAL CHOICE

State and federal law require the charter school itself to be non-profit,<sup>87</sup> but charter remains free to contract out the entirety of their responsibilities to third-party entities.<sup>88</sup> These third parties are, in many instances, for-profit.<sup>89</sup> In words, Columbia Academy Charter School may technically hold the government charter to provide education to 400 elementary students, but once it receives the charter, it enters into a contract with a for-profit management company that provides all of the services. If the charter and the for-profit company were entirely independent, the contracts between them may not raise serious issues, but evidence from the past decade has shown this is not always the case.

Preston Green has documented a number of what he terms related-party transactions, meaning that charter and the management company are affiliated in some respect.<sup>90</sup> The charter operates as a shell entity that funnels public money to for-profit entities that otherwise would not be able to access the money.<sup>91</sup> To be clear, however, a nefarious relationship need not exist for problems to occur. The very act of the chartering entity surrendering most of its responsibility to private for profit-industry poses a serious risk that the management company profits from public education with little if any oversight and accountability.

Analyzing North Carolina charter schools documents and reports, Thomas Kelly revealed that a private for-profit entity, National Heritage Academies (NHA), managed several charters in the state under a “sweeps” contract.<sup>92</sup> Under these sweeps contracts, nearly every public dollar that was deposited into a charter’s bank account was “instantaneously swept out” and “deposited into NHA’s.”<sup>93</sup> NHA became responsible for every single aspect of running the charter school—everything from hiring teachers to acquiring real estate, furniture, and equipment.<sup>94</sup> Any money left over was NHA’s to keep as a management fee.<sup>95</sup> NHA and other private entities in North Carolina deposit “millions of public dollars into [their] own coffers every year and reveal[] little about precisely how that money is spent and how much of it goes to corporate profits rather than the provision of public education.”<sup>96</sup>

Kelly, however, seemed to unearth significant profit in the real estate agreements these private entities negotiated. The management companies “obtain[ed] ownership of valuable properties using public funds and charge[d] charter-holding nonprofits rent (possibly above-market rent) long after their acquisition-related debts are paid off.”<sup>97</sup> The sweeps contract, however, gives even the well-intentioned charter almost no power to do anything

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<sup>87</sup> See *Arizona State Board for Charter Schools v. United States*, 464 F.3d 1003 (9th Cir. 2006).

<sup>88</sup> Green et al., *supra* note 18.

<sup>89</sup> *Id.*

<sup>90</sup> Preston Green III, *Is Charter School Fraud the Next Enron?*, THE CONVERSATION, Apr. 27, 2017.

<sup>91</sup> *Id.*; see also Marian Wang, *When Charter Schools Are Nonprofit in Name Only*, PROPUBLICA (Dec. 9, 2014), <https://www.propublica.org/article/when-charter-schools-are-nonprofit-in-name-only>.

<sup>92</sup> Kelley, *supra* note 18, at 1802.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1802–03.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

about it. As litigation in Ohio challenging these contracts revealed, state statutes often authorize this exact type of profiteering.<sup>98</sup>

Critics of charters often point to these management and oversight details as evidence of why charters are bad policy.<sup>99</sup> They may or may not be correct. The point of this Article is not to offer a per se critique of charters, but to clearly identify the advantages that they and those who operate them have. Flexibility and minimizing bureaucracy may, in fact, produce benefits for public education. But to the extent those benefits exist, states have directed the benefits to charters, not traditional public schools. Traditional public education continues to operate under traditional rules. This disparity represents a preference for private choice over public education.

### 3. Teachers

Teacher salaries consume 80% of public school budgets and an equally large share of administrative tasks.<sup>100</sup> This huge swath of the education enterprise operates under an entirely different set in charter schools. Charters are largely exempt from the numerous state and federal laws that seek to ensure that teachers are competent and public schools treat them fairly.<sup>101</sup> To the extent that those protections benefit students, one might argue that charter school exemptions are not an advantage at all. Yet, the point here is not that charters are or are not substantively better, but that states have devised policies that preference charters as an institution over public schools. Charters as an institution are free from the burdens of hiring, retaining, and monitoring staff that can meet state quality controls.<sup>102</sup> Likewise, charters can more easily terminate teachers at their discretion.<sup>103</sup> In these respects, charters can take state resources and run with them as they see fit, whereas public schools must operate within a set of strict parameters.

<sup>98</sup> Hope Acad. v. White Hat Mgmt., 145 Ohio St. 3d 29, 31 (Ohio 2015).

<sup>99</sup> See, e.g., Patrick J. Gallo, Jr., *Reforming the "Business" of Charter Schools in Pennsylvania*, 2014 B.Y.U. EDUC. & L.J. 207, 207 (2014); Naclerio, *supra* note 68.

<sup>100</sup> See, e.g., Wyoming v. Campbell Cty., 19 P.3d 518, 540 (Wyo. 2001).

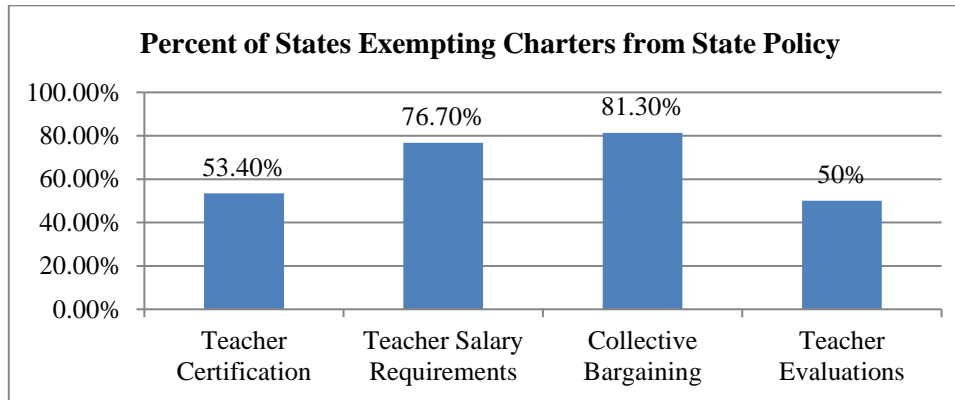
<sup>101</sup> See, e.g., Tipka v. Lincoln Intern. Charter School, 864 N.W.2d 371 (Minn. Ct. App. 2015) (holding that laws affecting public employees do not apply to charter school employees); Chicago Mathematics & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. No. 41, slip op. at 1 (Dec. 14, 2012); Pilsen Wellness Ctr., 359 N.L.R.B. No. 72, slip op. at 1 (Mar. 8, 2013); Kate Gallen, *The Role of the Judiciary in Charter Schools' Policies*, 77 MO. L. REV. 1121, 1127 (2012); *Measuring Up*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS <http://www.publiccharters.org/law-database/automatic-exemptions-state-district-laws-regulations/> (collective bargaining does not apply).

<sup>102</sup> See, e.g., SC CODE § 59-40-50 (permitting uncertified teachers in SC schools); SC CODE 59-40-60 (leaving compliance with teacher regulations to discretion of charter); <http://www.ncpa.org/pub/ba285>; See also Joshua M. Cowen & Marcus A. Winters, *Do Charters Retain Teachers Differently? Evidence from Elementary Schools in Florida*, 8 EDUC. FINANCE & POLICY 14 (2013) (analyzing the net effect of this flexibility).

<sup>103</sup> See, e.g., Brian Hicks, *Tough to Fire Teachers—Unless They Work at a Charter School*, POST & COURIER, July 28, 2016; 24 PA. STAT. ANN. § 17-1724-A (no tenure); <http://www.publiccharters.org/law-database/automatic-exemptions-state-district-laws-regulations/> (exempting from tenure); Jennifer Hom Chen, *California Charter School Teachers: Flexibility in the Classroom, Vulnerability As an Employee*, 67 HASTINGS L.J. 1733 (2016).

## PREFERENCING EDUCATIONAL CHOICE

First, as the figure below shows,<sup>104</sup> 53.40% of states exempt charters from teacher certification laws. In some states, charters are free to hire anyone they deem qualified.<sup>105</sup> In others, charters can hire a certain percentage of uncertified teachers, so long as the rest are certified.<sup>106</sup> Other states simply set up alternative certification requirements for charter teachers that are less demanding than traditional public schools.<sup>107</sup>



These exemptions have, over the past few years, played a particularly special role in sparing charters from the teaching crisis that has confronted public schools. In 2015, public schools nationwide experienced the beginning of an extreme shortage of minimally qualified and certified teachers.<sup>108</sup> California schools, for instance, needed to hire 40% more certified teachers than were actually in the market.<sup>109</sup> The shortage was only projected to get worse in the coming years.<sup>110</sup> Shortages of this sort created intense competition for certified teachers both within and between states.<sup>111</sup> Less competitive schools were forced to cancel classes, expand class sizes, seek regulatory waivers, and

<sup>104</sup> The calculations in this figure are generated from data in these sources from the Education Commission of the States: <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1525>; <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1526>; <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1528>; Preston C. Green III et. al., *An Analysis of the Policy, Research, and Legal Issues Surrounding the Exclusion of Charter Schools from the Teacher Evaluation Revolution*, 43 J.L. & EDUC. 463, 467 (2014)

<sup>105</sup> Educ. Commission of the States, *Charter Schools-Do Teachers in a Charter Have to Be Certified?* (Jan. 2016).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. TIMES, Aug. 10, 2015, at A1.

<sup>109</sup> *Id.* (state issued 15,000 teaching credentials, which was 6,500 short of the open teaching positions); see Academic Year 2014–15 Data, TITLE II HIGHER EDUCATION ACT, DATA TOOLS, <https://title2.ed.gov/Public/DataTools/Tables.aspx> (finding a sharp drop in the number of students pursuing education degrees); MARJORIE A. SUCKOW & ROXANN L. PURDUE, CAL. COMM’N ON TEACHER CREDENTIALING, TEACHER SUPPLY IN CALIFORNIA: A REPORT TO THE LEGISLATURE ANNUAL REPORT 2013–2014, at 16 (2015).

<sup>110</sup> *Id.*

<sup>111</sup> Missouri, for instance, raided Kansas of 4,000 teachers in 2015—a 70% jump from prior years. Katie Ferrell, *Kansas Teacher Shortage Expected to Get Worse if Funding Issues Aren’t Resolved* (Aug. 3, 2015), <http://fox4kc.com/2015/08/03/kansas-teacher-shortage-expected-to-get-worse-if-funding-issues-arent-resolved/>; AP, *Teacher Shortages Spur Districts Nationwide to Try New Tactics*, (Aug. 12, 2015), <http://www.cbsnews.com/news/teacher-shortages-spur-districts-nationwide-to-try-new-tactics/>.



place individuals in the classroom who otherwise never would have been hired.<sup>112</sup> Charters did not confront this same problem because they, as they always had been, were free to hire teachers regardless of their credentials.

Second, charters have far more flexibility regarding the salary and benefits they provide their teachers. Unlike traditional public schools, four out of five states do not require charters to collectively bargain with their teachers.<sup>113</sup> Charters can negotiate salaries and benefits as they choose—with teachers individually or as a group. Even when negotiating with group negotiations, a charter can typically negotiate salaries and benefits that are lower than the prevailing wages in the area.<sup>114</sup> Neither the local collective bargaining agreement of the district, nor teacher salary laws apply.<sup>115</sup> When teachers challenged these practices, the National Labor Relations Board found that while charters were creations of state law, state law made charters akin to private corporations that are not obligated to act as public employers.<sup>116</sup>

This flexibility allows a charter or the private management group that operates the charter to spend its resources on things other than classroom instruction. Data in Ohio, for instance, indicates that the percentage of resources devoted to teacher compensation is far lower in charter schools than traditional public schools, whereas administrative overhead is twice as high in charters.<sup>117</sup> This administrative overhead, as suggested by Kelly and Green's work, translates into profits for those managing the charter school or doing business with it.<sup>118</sup>

Third, once charters secure their teaching force, they are largely free to manage their teachers as a private employer would. Most notable, charter teachers do not have access to tenure protections. Teachers with a demonstrated record of good performance acquire tenure in most states and cannot be removed absent good cause,<sup>119</sup> but charter school teachers do not acquire tenure or due process protections in most states.<sup>120</sup> The only rights

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<sup>112</sup> See, e.g., Kristen A. Graham, *Looking for a Few Thousand Substitute Teachers*, PHILLY.COM, Aug. 31, 2015; STATE OF CAL. COMM'N ON TEACHER CREDENTIALING, DISTRICT INTERN CREDENTIALS 3 (2015), (permitting interns to teach after 120 hours of training or six credit hours of course work); Andrea Eger & Nour Habib, *Crisis Hits Oklahoma Classrooms With Teacher Shortage, Quality Concerns*, TULSA WORLD, Aug. 16, 2015, [http://www.tulsaworld.com/news/education/crisis-hits-oklahoma-classrooms-with-teacher-shortage-quality-concerns/article\\_54627559-bcc0-5ae5-b654-9b7eec46ab3c.html](http://www.tulsaworld.com/news/education/crisis-hits-oklahoma-classrooms-with-teacher-shortage-quality-concerns/article_54627559-bcc0-5ae5-b654-9b7eec46ab3c.html); Rebecca Klein, *Kansas Underfunded Education and Cut Tenure. Now It Can't Find Enough Teachers to Fill Classrooms*, HUFFINGTON POST (July 31, 2015) (using uncertified teachers and substitutes).

<sup>113</sup> *Charter Schools—Are Charter Schools Bound by School District Collective Bargaining Agreements?*, EDUC. COMM'N OF THE STATES (January 2016).

<sup>114</sup> See, e.g., *New York Charter Ass'n v. Smith*, 940 N.E.2d 522, 526 (2010).

<sup>115</sup> *Id.*; see also *Charter Schools—What Sets Teacher Salaries?*, EDUC. COMM'N OF THE STATES (January 2016).

<sup>116</sup> *Chicago Mathematics*, 359 N.L.R.B. No. 4; see also Rachel M. Cohen, *The National Labor Relations Board Says Charter School Teachers Are Private Employees*, AM. PROSPECT, Sept. 8, 2016, <http://prospect.org/article/national-labor-relations-board-says-charter-school-teachers-are-private-employees>.

<sup>117</sup> *Short-Changed*, *supra* note 35.

<sup>118</sup> Kelly, *supra* note; Green, *supra* note 90.

<sup>119</sup> See generally Black, *supra* note 21, at 103.

<sup>120</sup> See, e.g., Chen, *supra* note 103; see also *Charter Schools—Does the State Require School Districts to Grant Teachers a Leave of Absence to Teach in a Charter School?*, EDUC. COMM'N OF THE STATES (January 2016), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1527>.

charter teachers have are those that the charter school is willing to extend through contract. Thus, charters often have the ability to dismiss teachers with or without good reason and with or without any process. As a practical matter, this means letting go of expensive teachers, teachers who might express opinions that leadership does not like, and teachers who might want better workplace conditions. For that matter, charters in some state appear to have the ability to even compel their teachers to do their political bidding<sup>121</sup>—something public schools absolutely cannot do.<sup>122</sup>

One of the rationales for exempting charters from tenure and other requirements was to allow them to easily terminate ineffective teachers.<sup>123</sup> Ironically, however, states had another solution to the ineffective teacher problem. Around 2008, states began developing complex statistical teacher evaluations systems to identify and remove ineffective public school teachers.<sup>124</sup> Yet, half of the states did not extend those systems to charter schools.<sup>125</sup> Had states extended these evaluation systems to charters there may have been little need for tenure and other exemptions. In short, public schools took on vast new responsibilities regarding teacher evaluation, while charters in many states continued with business as usual.

#### 4. *Students*

Finally, charters do not operate under the same student enrollment and retention policies as traditional public schools. The most important distinction may be the charters' ability to cap their enrollment number. A fundamental aspect of what makes a traditional public school "public" is its duty to serve the community in which it is situated.<sup>126</sup> Public schools—or the district—cannot turn away or fail to serve students for any reason. Making the point clear, some states even obligate districts to serve students whom they have suspended or expelled.<sup>127</sup> In contrast, charters control their own enrollment, not the communities in which they locate themselves. A charter sets its own enrollment cap in its

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<sup>121</sup> Zoë Carpenter, *Were Charter Teachers and Students Pressured to Rally for Charter Schools in Albany?*, NATION (Mar. 14, 2014), <https://www.thenation.com/article/were-charter-teachers-and-students-pressured-rally-charter-schools-albany/>.

<sup>122</sup> In fact, Texas law, for instance, prohibits school districts themselves from promoting their desired policies with state resources. TEX. ELEC. CODE ANN. § 255.003 (prohibiting public employees from devoting resources to political advertising); TEX. EDUC. CODE ANN. § 11.169 (prohibiting school districts from using funds or resources "to electioneer for or against any candidate, measure, or political party.")

<sup>123</sup> Chen, *supra* note 118.

<sup>124</sup> Through the Race to the Top Program and waivers under No Child Left Behind, the U.S. Department of Education required states to change their laws and evaluate teachers based on their students' standardized exam scores and make personnel decisions based on those evaluations. Black, *supra* note 119.

<sup>125</sup> Green, *supra* note 104 (finding the teacher evaluation systems applied to charters in 9 states, did not apply in 9 states, and were unclear as to whether they applied in 3 states).

<sup>126</sup> Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 477-79 (2013).

<sup>127</sup> *Clinton v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985) (noting that the obligation to provide education came from statutes); *King v. Beaufort Cty.*, 364 N.C. 368, 370, 704 S.E.2d 259, 260 (2010); *State ex rel. G.S.*, 749 A.2d 902, 907 (N.J. Super. Ct. Ch. Div. 2000).

state application and is under no obligation to expand or make alternative arrangements for additional students, not even for needy students who live next door to the charter.<sup>128</sup>

Second, charters have far more leeway to exclude students once they are enrolled. Charters may adopt curriculum and codes of conduct that are far more rigorous than the traditional public schools and then exclude students who cannot meet these expectations (or encourage students to voluntarily leave).<sup>129</sup> For instance, some charters have discipline policies that assign students demerits for behavior as minor as not walking in a straight line or not looking up when an adult is speaking.<sup>130</sup> The accumulation of too many demerits leads to expulsion.<sup>131</sup> A high court in California went so far as to say that because charters are schools of choice, they need not even afford students due process hearings prior to exclusion.<sup>132</sup>

Traditional public schools have latitude in school discipline as well, but not that much. Most obviously, the policies would be subject to public approval, which would hopefully reign in abusive policies. Even if not, the constitution would likely limit certain discipline policies.<sup>133</sup> At the very least, public schools must afford students due process prior to suspension or expulsion.<sup>134</sup> In short, public schools have the power to exclude students, but that power exists within a distinct set of legal parameters. Whereas, charters have substantial latitude that, in effect, permits them to serve the students they wish to serve, not all of the students who may wish to come.

Third, charters also have the ability to shape the pool of students who seek enrollment. Charters advertise and promote their school to prospective applicants. Marketing is so key to the business of starting and growing a charter school that the industry puts together marketing guidebooks.<sup>135</sup> The manner in which a charter markets itself, however, allows it to encourage some applicants and remain unknown to others.<sup>136</sup> Likewise, through their curricular focus, transportation policies, receptivity to student needs, and capacity to serve students with special needs, charters can discourage and encourage certain demographic

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<sup>128</sup> See, e.g., ARK. CODE ANN. § 6-23-402; 24 PA. STAT. ANN. § 17-1723-A (affording district discretion in enrollment numbers, but prohibiting local board from capping charter enrollment); see also *Sch. Dist. of Philadelphia v. Dep't of Educ.*, 625 Pa. 418, 419, 92 A.3d 746, 747 (2014) (adjudicating a dispute regarding charter enrollment cap).

<sup>129</sup> Kerrin Wolf et al., *Charting School Discipline*, 48 URB. LAW. 1 (2016).

<sup>130</sup> *Id.*; Noreen S. Ahmed-Ullah, *Chicago's Noble Charter School Network Has Tough Discipline Policy*, CHICAGO TRIBUNE, Apr. 7, 2014.

<sup>131</sup> Wolf, *supra* note 129; Kari Harden, *Civil Rights Complaints Are Filed Against Three N.O. Schools*, LOUISIANA WEEKLY, Apr. 22, 2014 (discussing a civil rights complaint against a charter school with a 68% suspension rate).

<sup>132</sup> *Scott B. v. Board of Trustees*, 217 Cal. App. 4th 117 (Cal. App. 4th Dist. 2013).

<sup>133</sup> Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823 (2015).

<sup>134</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>135</sup> Lisa Relou, *Stand Out: A Guide to School Marketing*, COLO. LEAGUE OF CHARTER SCHS. [https://www.charterschoolcenter.org/sites/default/files/files/field\\_publication\\_attachment/StandOut-Marketing-Toolkit-2015.pdf](https://www.charterschoolcenter.org/sites/default/files/files/field_publication_attachment/StandOut-Marketing-Toolkit-2015.pdf) (last visited July 28, 2017).

<sup>136</sup> See generally Kara Finley, *Advertising and Charter School Families*, Southern Utah University (thesis) (April 2015) <https://www.suu.edu/hss/comm/masters/capstone/project/k-finley.pdf>.

groups.<sup>137</sup> This is not to suggest that charters officially discriminate against special education students, but that some families do not bother applying because they do not believe the charter can or will meet their child's needs.<sup>138</sup> Those same parents, however, know that a public school is required to serve the entire community and the needs of all the students in it (even if the school is ineffective in discharging that duty).<sup>139</sup> Parents need not apply to public schools; their children are guaranteed to attend.

Data bears out the effect of these subtle practices. Traditional public schools typically enroll a higher percentage of special education and English Language Learners (ELL) students than charter schools.<sup>140</sup> In Newark, for instance, seven charter schools sent applications to the Department of Education.<sup>141</sup> Those applications revealed that not a single charter school enrolled a special education population comparable to the public schools.<sup>142</sup> Five out of seven enrolled less than half the percent as public schools.<sup>143</sup> The comparison was even worse in regard to ELLs. ELLs make up 9% of Newark public schools, but were 1% or less of the population in six out of seven charters.<sup>144</sup> Reports reveal that this phenomenon is not unique to Newark.

## B. Vouchers

### 1. Funding

While state support for vouchers has traditionally been limited,<sup>145</sup> it has grown substantially in the last few years. Florida was at the leading edge of the expansion, developing what some refer to as “neo-vouchers.”<sup>146</sup> Rather than the traditional voucher that sent public funds directly to private schools, these neo-vouchers funnel the money through a complex process of tax-credits,<sup>147</sup> which is discussed further below. For the most part, however, this Article refers to vouchers and neo-vouchers collectively as vouchers

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<sup>137</sup> See, e.g., PAUL T. O'NEILL & TODD ZIEBARTH, CHARTER SCHOOL LAW DESKBOOK 4-5, 7 (2009) (noting charters' specialized curricula); Garda, *supra* note 59, at 686 (revealing how charters “counsel out” special education students).

<sup>138</sup> Garda, *supra* note 59.

<sup>139</sup> LAUREN M. RHIM & MARGARET J. McLAUGHLIN, CHARTER SCHOOLS AND SPECIAL EDUCATION: BALANCING DISPARATE VISIONS: AN INVESTIGATION OF CHARTER SCHOOLS AND SPECIAL EDUCATION IN FIFTEEN STATES 25 (2000) (“Parents look at the charters and see that the district offers their severely disabled child more services.” (internal quotation marks omitted)).

<sup>140</sup> See, e.g., Garda, *supra* note 59; Families for Excellent Schools, *The Neglect of NYC's English Language Learner and Special Needs Students* 3, <http://39sf0512acpc3iz0941zln5.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/Report-Neglect-of-NYCs-ELLSpecial-Needs-Students.pdf>; WEBER & RUBIN, *supra* note 59.

<sup>141</sup> *Abbott v. Burke*, Brief on Behalf of Appellant Education Law Center, In re Renewal Application of TEAM Academy Charter School, Superior Court of New Jersey Appellate Division, No. A-003416-15T1, Feb. 14, 2017.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 7–8.

<sup>145</sup> See generally Foreman, *supra* note 6.

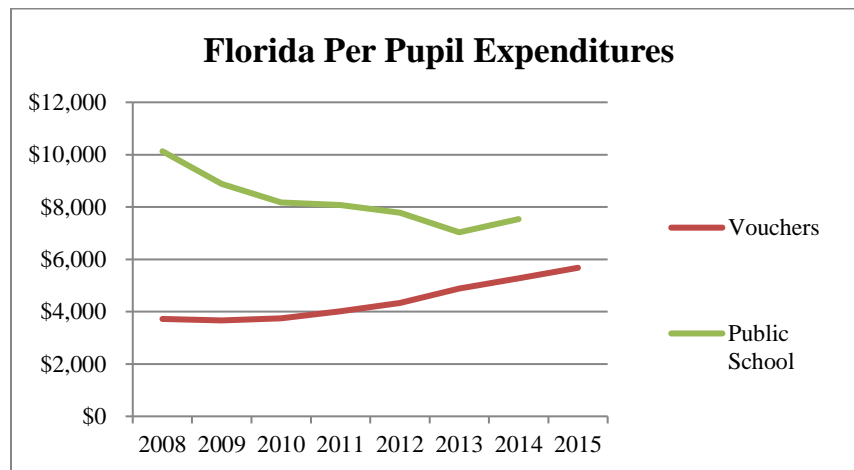
<sup>146</sup> KEVIN G. WELNER, NEOVOUCHERS: THE EMERGENCE OF TUITION TAX CREDITS FOR PRIVATE SCHOOLING (2008).

<sup>147</sup> *Id.*; see also Levin, *supra* note 9.

because the main point is to analyze the movement of public resources to private education, not the particular method.

In 2008, Florida spent \$87 million on its voucher program.<sup>148</sup> By 2014, the state's spending on the program had quadrupled.<sup>149</sup> Indiana followed Florida's lead and enacted the most expansive voucher program in our nation's history in 2011.<sup>150</sup> Within four years, student enrollment in Indiana's voucher program grew by roughly 600% and state expenditures on it by more than 700%.<sup>151</sup> After these programs survived constitutional challenge,<sup>152</sup> similar programs began expanding in other states as well.<sup>153</sup>

While the growth alone is compelling, the context in which it occurred makes it all the clearer that states were creating a preference for private choice. The expanded investment in new voucher programs came at the very same time that states were making huge cuts in public education. Between 2008 and 2012, for instance, Florida cut its public school per-pupil expenditures from \$10,129 to \$7,777.<sup>154</sup> Not only was Florida making more vouchers available, it was, as the chart below reveals, also increasing the value of those vouchers each year. The money the state spent on vouchers could have been used to offset cuts to public education, but the state chose not to, making its preference for private choice clear. Other states were even more explicit, taking those voucher increases directly out of local school district budgets.<sup>155</sup>



<sup>148</sup> FLA. DEP'T OF EDUC., CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM: JUNE QUARTERLY REPORT (2009), <https://www.stepupforstudents.org/wp-content/uploads/2015/09/ctc-stats-09-06.pdf>.

<sup>149</sup> X.

<sup>150</sup> Michelle Ye Hee Lee, *Mike Pence's Claim That Indiana Has the Largest School Voucher Program*, WASH. POST, Aug. 12, 2016.

<sup>151</sup> IND. DEP'T OF EDUC., T AL. PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA 6, 22 (June 2015).

<sup>152</sup> *Id.*

<sup>153</sup> See Education Law Center, *Voucher Watch*, July 21, 2017, [http://www.edlawcenter.org/assets/files/pdfs/Charters%20and%20Vouchers/Voucher\\_Watch\\_Chart\\_update\\_July\\_.pdf](http://www.edlawcenter.org/assets/files/pdfs/Charters%20and%20Vouchers/Voucher_Watch_Chart_update_July_.pdf)

<sup>154</sup> BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 8 (4th ed. 2015).

<sup>155</sup> TAMARINE CORNELIUS & JON PEACOCK, WISCONSIN BUDGET PROJECT, AN OVERVIEW OF EDUCATION ISSUES IN THE 2013-15 BUDGET (July 2, 2013).

Figure 4. Florida per-pupil expenditure. Source:

States increasingly accomplished this expanded funding through a complicated system that allows private individuals and companies to donate to private scholarship programs in exchange for tax credits.<sup>156</sup> The internal workings of that system further represent the private choice preference. First, those who donate to the program, in some instance, get back more than they contributed. Under federal law, donors were already eligible for up to a 35% refund in federal taxes.<sup>157</sup> States then lumped an additional refund of 70% to 100% on top of that.<sup>158</sup> In other words, some states created systems in which private parties can actually profit off of donating to the state's tax scholarship program. The states' motivation for the circuitous route itself was to avoid other legal barriers involved in funding traditional vouchers,<sup>159</sup> but states' willingness to overfund donors for the cost of voucher donations reveals an extreme preference for private choice, particularly when no equivalent tax credit program was available for donations to public schools. In short, states went above and beyond during a time of financial crisis to fund private choice, but did little if anything for public education.

This preference only becomes all the more unusual when one considers how program eligibility has changed over time. In prior decades, vouchers were reserved for disadvantaged students hoping to escape failing schools.<sup>160</sup> With that purpose in mind, the programs always remained limited in scale and the reimbursement amounts small. The recent increase in enrollment and voucher amounts, however, has coincided with abandoning that mission and its limits. New programs raise or entirely eliminate those income eligibility caps, making vouchers available to the middle and upper class as well.<sup>161</sup> At the same time, states vastly increased the number of vouchers they were willing to fund. Together, these changes opened the floodgates of raw expansion. In the years represented below, Florida's total expenditures on vouchers increased by 482% and Indiana's by 900%.

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<sup>156</sup> WELNER, *supra* note.

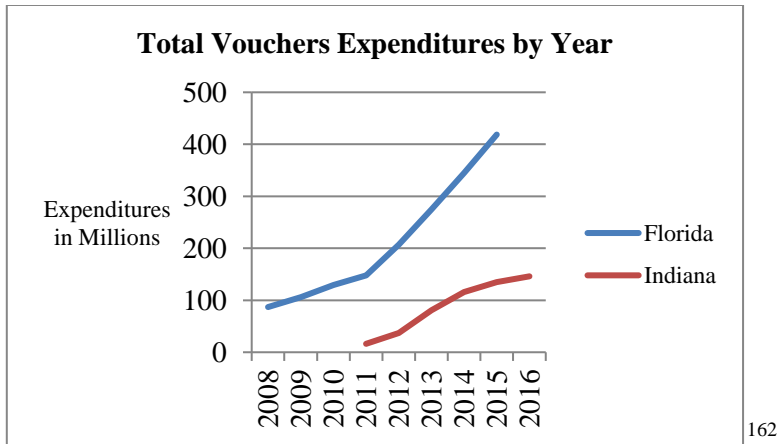
<sup>157</sup> Anya Kamenetz, "Tax Credit Scholarships," *Praised by Trump, Turn Profits for Some Donors*, NPR, Mar. 7, 2017, <http://www.npr.org/sections/ed/2017/03/07/518352548/trump-s-favorite-school-choice-program-allows-wealthy-donors-to-turn-a-profit>

<sup>158</sup> *Id.*

<sup>159</sup> *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

<sup>160</sup> *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002); *Jackson v. Benson*, 578 N.W.2d 602, 617 (Wis. 1998); *see also* Forman, Jr., *supra* note 6.

<sup>161</sup> *See, e.g.,* Derek Black, *Voucher Movement Finally Coming Clean? New Push Is All About Middle Income Students*, EDUC. LAW PROF BLOG (July 31, 2015); FLA. DEP'T EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM (Nov. 2015); Patti Zarling, *10 Things to Know About Private School Vouchers*, GREEN BAY PRESS GAZETTE, <http://www.greenbaypressgazette.com/story/news/education/2015/08/01/things-know-private-school-vouchers/30983793/>



In the last three years, other states have developed or proposed voucher programs that could make Florida and Indiana's programs appear modest by comparison. As large as the expansion in Florida and Indiana has been, the states still fund vouchers at a lower per-pupil level than public education and limit the number of vouchers they will fund per year (albeit at a high level). New programs in Arizona and Nevada have sought to eliminate both of these constraints.

In 2016, the Arizona nearly passed a voucher program that would have funded a voucher for every student in the state, regardless of income level or the performance of their local public school.<sup>163</sup> The voucher amount for regular education students was also set at 90% of state per-pupil expenditures in public schools and 100% for special education students.<sup>164</sup> The state eventually agreed to limit the number of vouchers it would fund, but retained the high reimbursement rates.<sup>165</sup>

In 2015, Nevada broke both barriers. It authorized vouchers at 90% to 100% of the statewide average per-pupil funding for public schools and included no limit on the number of students who could participate.<sup>166</sup> In other words, it authorized the diversion of nearly every cent of state public-education funding to vouchers.<sup>167</sup>

<sup>162</sup> Indiana calculations were based on IND. DEP'T OF EDUC., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA (Jan. 27, 2014); IND. DEP'T OF EDUC., CHOICE SCHOLARSHIP PROGRAM ANNUAL REPORT: PARTICIPATION AND PAYMENT DATA (Feb. 2017); Florida calculations were based on: FLA. DEP'T OF EDUC., CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM (2010); FLA. CORPORATE TAX CREDIT 2009, *supra* note 148; FLA. DEP'T OF EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM (2011); FLA. DEP'T OF EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM (2016).

<sup>163</sup> Arizona Senate Bill 1279 (2016), <http://www.azleg.gov/legtext/52leg/2r/bills/sb1279s.pdf>

<sup>164</sup> *Id.* See also Wingett & O'Dell, *supra* note 4.

<sup>165</sup> The bill originally would have authorized funding for an unlimited number of participants, but was later scaled back. Yvonne Wingett Sanchez et al., *Gov. Doug Ducey Signs Expansion of Arizona's School-Voucher Program*, AZCENTRAL.COM (Apr. 7, 2017).

<sup>166</sup> *Schwartz v. Lopez*, 382 P.3d 886, 892 (Nev. 2016).

<sup>167</sup> After the Nevada Supreme Court declared the program unconstitutional because it drew its resources directly out of the state's common school fund, the Governor still moved to reinstate the program and simply rely on a different funding source. Sharon Krengel, *Big Setback for Vouchers in Nevada*, ELC EDUC. L. CTR., June 5, 2017, <http://www.edlawcenter.org/news/archives/nevada/big-setback-for-vouchers-in-nevada.html>

## 2. *Students*

In addition to these funding preferences, states have advantaged private voucher schools in terms of the students they enroll and the rights they afford them. In general, these voucher preferences fall under the category of offering public money with no strings attached. Public schools, of course, are subject to a number of constitutional and statutory limitations, most notably those pertaining to non-discrimination and general student rights. Private schools, because they are not state actors, are not subject to those constitutional limitations, nor are they generally subject to education statutes.<sup>168</sup> That freedom is fair enough when private schools are not using public money, but far more questionable when they are.

States have, at best, ignored the issue and, at worst, have sought to exploit the freedom of private schools. States have funneled enormous sums of money and students to private schools through vouchers without asking that those schools ensure the funds are spent consistent with prevailing public values.<sup>169</sup> The private schools remain free to discriminate against students in the enrollment process (particularly in regard to religion), restrict student speech, punish students harshly, deny students basic due process, and refuse to provide special education services.<sup>170</sup> Some legislators would argue that these exemptions are the very point of funding vouchers. They, for instance, want to free the state of the cost and legal demands of educating students with disabilities. Encouraging private schools to take these students without any strings attached achieves this end.<sup>171</sup> Similarly, many voucher proponents want to provide students with religious experiences that are prohibited in public schools.<sup>172</sup>

Whatever the merits of these motivations, the exemptions represent a substantial preference for private choice in education. Public schools must take all students, whereas private schools can choose their students, including on grounds that would be illegal in public school. Likewise, when a student's performance, attitude, or beliefs become undesirable, a private school can exclude the student.

This discretion, in its various forms, allows private schools to create homogenous enclaves that are inapposite to public education. While that right might be appropriate in a purely private setting, the government need not facilitate these inapposite values when those schools are no longer fully private. When those schools enroll public school students and rely on public money, the failure of a state to check private biases amounts to tacit acceptance. For that reason, the federal government has traditionally taken a stance entirely contrary to the one states are taking. Federal statutes make any private school

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<sup>168</sup> See, e.g., *Johnson v. Pinkerton Academy*, 1988, 861 F.2d 33; *Countryman*, *supra* note 20.

<sup>169</sup> U.S. DEP'T OF EDUC., *STATE REGULATIONS OF PRIVATE SCHOOLS* (2009); See also National Conference of State Legislatures, *supra* note (listing the minimal requirements that some states do place on private voucher schools).

<sup>170</sup> *Countryman*, *supra* note 20.

<sup>171</sup> Claire S. Raj, *Waiving Special Education Rights* (forthcoming).

<sup>172</sup> Katherine Stewart, *Betsy DeVos and God's Plan for Schools*, N.Y. TIMES, Dec. 13, 2016.



receiving federal funds subject to a host of race, sex, and disability discrimination statutes, among others.<sup>173</sup>

### C. *Shrinking Education Pot*

The funds available for public education on the whole have shrunk dramatically over the past decade. Available data suggests that the decline correlates with the expansion of choice and that the overall pot of public education funding, even if charters were included, is shrinking. In other words, states' choice policies are not simply robbing Peter to pay Paul. They are robbing Peter under the auspices of giving it all to Paul, but actually shaving a chunk off of public education funding and leaving Peter and Paul to fight one another. The push for choice makes the ruse possible.

Ten and twenty percent reductions in public education funding were commonplace during the recession. The recession, however, does not explain the extent to which those cuts have remained. As of 2015, thirty-one states were still funding public education below pre-recession levels.<sup>174</sup> During the same period voucher and charter programs grew rapidly. That growth remains today, even in states that already have substantial choice programs and remain well below their pre-recession funding levels.

In 2014, Arizona, Florida, and New Jersey, for instance, were still 23%, 7.8%, and 7.5% below pre-recession spending respectively. Yet, in 2014–15, they were projected to experience growth rates in charter enrollment at or above 20%.<sup>175</sup> In addition, Arizona and Florida have laid the ground for and experiencing even greater growth in their voucher programs.<sup>176</sup> The irony here, however, is that no matter who gets the money—charter schools, public schools, or vouchers—the overall pot was shrinking. This trend attests the possibility that some policymakers do not simply prefer private choice, they lack a commitment to public education.

### D. *Taking Choice to the Next Level*

Events over the past year suggest that the preference for private choice could become more deep-seated and widespread. Thus far, the preference has expanded on a state-by-state basis and to varying degrees. The federal government, however, is seeking to play a leadership role and spur further expansion. The President has repeatedly pledged his full support to expanding school choice. Most prominently, the President decried public schools as delivering “inferior education” in a 2017 speech to Congress, declaring his

<sup>173</sup> See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677 (1979); OFFICE FOR CIVIL RIGHTS, TITLE VI ENFORCEMENT HIGHLIGHTS 1 (July 2012); § 504 of the Rehabilitation Act of 1973.

<sup>174</sup> MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1 (Jan. 25, 2016).

<sup>175</sup> NAT’L ALL. FOR PUB. CHARTER SCHS., *Estimated Number of Public Charter Schools & Students, 2014–2015*, Feb. 2015, [http://www.publiccharters.org/wp-content/uploads/2015/02/open\\_closed\\_FINAL.pdf](http://www.publiccharters.org/wp-content/uploads/2015/02/open_closed_FINAL.pdf)

<sup>176</sup> Wingett, *supra* note 4; Leslie Postal, *House Panel Votes to Expand School Vouchers*, ORLANDO SENTINEL, Mar. 7, 2017.

“school-choice bill” as the solution to the “the civil rights issue of our time.”<sup>177</sup> The President appointed Betsy DeVos as Secretary of Education to carry out the agenda. She has been even more direct, arguing that parents have the “right” to school choice<sup>178</sup> and those opposing the right are “flat-earthers.”<sup>179</sup>

In May 2017, the administration proposed a federal budget that would achieve the “most ambitious expansion of education choice in our nation’s history”<sup>180</sup> The new budget would add \$1 billion to Title I of the Elementary and Secondary Education Act—the primary mechanism for providing supplemental resources to low-income students.<sup>181</sup> To access the money, however, states and districts would have to adopt student enrollment policies that allow families to choose their own schools and take public money with them.<sup>182</sup> Partial state supplements for school choice would be insufficient. The budget would require that all local, state, and federal dollars follow the child, regardless of the school the student attends.<sup>183</sup> In other words, the budget would nationalize the most aggressive type of school choice preference—one that would allow every penny of public education funding to flow into choice.

Whether this budget proposal gains traction this year or next remains to be seen, but the forceful stance may have emboldened states to act in advance. An expansive voucher bill closely aligned with the President’s agenda received the approval of the Texas senate and governor.<sup>184</sup> When it later failed in the House, the Senate refused to pass a public education budget unless the house agreed to at least a scaled-back version of the school choice bill.<sup>185</sup> While choice expansion does not come as a complete surprise in Texas, school choice bills also moved forward in several other less obvious states.<sup>186</sup> By June 2017, new voucher bills had been proposed in 24 states.<sup>187</sup>

The major voucher programs already in place combined with the potential of these new ones threaten a new era in education choice and the expenditure of public education

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<sup>177</sup> Louis Freedberg, *Trump Frames “School Choice” Agenda as Civil Rights Initiative*, EDSOURCE, Mar. 8, 2017, <https://edsource.org/2017/trump-frames-school-choice-agenda-as-civil-rights-initiative/578092>.

<sup>178</sup> AP, *Trump Education Pick DeVos Promotes School Choice at Confirmation Hearing*, Jan. 17, 2017, <http://www.foxnews.com/politics/2017/01/17/trump-education-pick-devos-to-push-school-choice-at-confirmation-hearing.html>; see also Greg Toppo & Todd Spangler, *DeVos Grilled by Democratic Leaders over Her Advocacy for School Choice*, USA TODAY (Jan. 17, 2017) (speaking of private school options as what parents “want, expect and deserve” because “[n]ot all [public] schools are working for the students that are assigned to them.”).

<sup>179</sup> Kate Abbey-Lambertz, *Betsy DeVos Compares School Choice Critics to “Flat-Earthers,”* HUFFINGTON POST, May 23, 2017.

<sup>180</sup> *Id.*

<sup>181</sup> WHITE HOUSE, *supra* note.

<sup>182</sup> *Id.*

<sup>183</sup> WHITE HOUSE, *supra* note.

<sup>184</sup> Robert T. Garrett, *Complex Texas Voucher Bill Would Shift Funds to Families, But Costs to State, Schools Unclear*, DALLAS MORNING NEWS, Feb. 8, 2017.

<sup>185</sup> Robert T. Garrett, *Texas Senators’ Debate over Private-School Vouchers Gets Heated*, DALLAS MORNING NEWS, July 21, 2017.

<sup>186</sup> New Hampshire: Source; Brian Washington, *5 States to Watch Regarding Private School Voucher Threats*, EDUCATIONVOTES, Jan. 27, 2017, <http://educationvotes.nea.org/2017/01/27/5-states-watch-regarding-private-school-voucher-threats/> (discussing voucher bills in Nevada, Virginia, Nebraska, Iowa, Missouri. New Hampshire).

<sup>187</sup> *Voucher Watch*, *supra* note.

funds. As Michael Heise’s empirical analysis of charter and voucher legislation prior to 2012 revealed, charter school legislation had vastly expanded, in part, as a “defensive political move to deflect school voucher progress or a political compromise.”<sup>188</sup> The recent vast expansion of voucher programs in states that already have a robust charter school program, however, may suggest that the solidification of charters has expanded state’s appetite for choice in all forms. In other words, while charters may have stalled voucher expansion in the past, it helps fuel it now. As the President’s proposal makes clear, the new movement does not pit charters against vouchers in a fight over meager crumbs; it seeks to make all public expenditures on education fungible as amongst traditional public schools, charters, and vouchers. This occurrence at the state or federal level would represent a fundamentally new era in the structure of educational opportunity.

## II. UNDERMINING EDUCATIONAL OPPORTUNITY

While states’ preference for choice communicates an important message, the actual effect of state policy on public education opportunities matters just as much, if not more. A state might, after all, preference choice but serve families who forego the choice options that a state presents. Under these circumstances, a state’s preference might have minimal effects on public education. On the other hand, a state that offers families a choice may intend to maintain its commitments to public education, but its policies inadvertently or carelessly undermine public education. Because state constitutions generally impose an absolute duty on states to deliver certain types of educational opportunities, these effects are crucial.

Yet, prior scholarship has tended to miss the most important effects by focusing on the macro level. At the macro level, claims that choice is undermining public education often appear alarmist. For the first decade of charter legislation, charter schools enrolled less than one percent of the nation’s students.<sup>189</sup> While charters have grown exponentially, the number of students in charters today remains small at five percent nationally.<sup>190</sup> Even states with the largest charter populations, public schools’ statewide market share remains dominant. Only five states have charter populations in excess of ten percent.<sup>191</sup> Voucher enrollments are far more meager.

At the micro level, however, the effects of choice can be staggering. Statewide education choice policies do not affect all districts equally. Their effects are heavily concentrated on a select group of districts. These districts can have choice programs that enroll a third of a district’s students—and those percentages continue to grow. As the following sections demonstrate, that growth is causing opportunity deficits in public schools, threatening the very financial viability of some districts, and stratifying educational opportunity across and within education sectors.

<sup>188</sup> Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917 (2012).

<sup>189</sup> *Digest of Education Statistics*, NCES: NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_216.20.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_216.20.asp).

<sup>190</sup> *Fast Facts*, NCES: NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=30>.

<sup>191</sup> *Id.*

## PREFERENCING EDUCATIONAL CHOICE

### A. *Concentrating the Effects of Choice and the Shrinking Education Pot*

When viewed at the statewide level, funding and choice trends may appear manageable, but at the district level, they are rapidly transforming public school districts and fundamentally compromising their ability to deliver quality and consistent educational opportunities. In Ohio, Columbus and Cleveland provide harsh examples. Between 2004 and 2013, the percentage of students enrolled in charter schools in Columbus rose from less than ten percent to thirty percent.<sup>192</sup> The trajectory in Cleveland was nearly identical.<sup>193</sup> Midway through that era, statewide funding for public education took a serious dip.<sup>194</sup> While it has since rebounded some in 2014, it remained 2.2% below 2008 levels.<sup>195</sup>

A closer look at Cleveland and Columbus, however, reveals that those districts are bleeding money to charter schools and the state is doing little to address the problem. The state, for instance, recently announced a \$464 million statewide increase for public education.<sup>196</sup> That increase, however, was swallowed by the \$760 million in transfers the state would require districts to make to charters.<sup>197</sup> The deficit, of course, was most pronounced in places where charters are concentrated. Cleveland saw a \$5 million increase in state funding, but would have to transfer \$141 million to local charters.<sup>198</sup> Columbus saw a \$40 million increase from the state, but would transfer \$116 million to charters.<sup>199</sup>

As the education pot shrinks, the delivery of public education becomes all the more tenuous in those districts also experiencing the concentrated effects of choice expansion. The more traditional public education suffers the more the overall statutory structure incentivizes exits from the public education system. A viscous cycle of this sort threatens a situation in which choice programs are the only ones capable of thriving. Whether any particular district has reached or is about to reach a point of no return is beyond the scope of this Article, but serious harms are regularly occurring in major cities.

Newark, New Jersey, provides an excellent case study. There, dwindling state revenues and charter school policies appear to have directly undermined the district's ability to fund adequate education opportunities. In 2010, the state announced massive cuts to its education funding formula, reducing the statewide budget by \$1.1 billion (15%) from the previous year.<sup>200</sup> This represented a \$1.6 billion shortfall in terms of the state's

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<sup>192</sup> See BRUCE D. BAKER, EXPLORING THE CONSEQUENCES OF CHARTER SCHOOL EXPANSION IN U.S. CITIES, EPI: ECON. POL'Y INST., at f.3, Nov. 30, 2016.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> LEACHMAN, *supra* note 174.

<sup>196</sup> *Budget Briefing: District-by-District Funding Impacts of Ohio Charter Schools*, INNOVATIONOHIO.ORG, 2015, [http://innovationohio.org/wp-content/uploads/2015/02/IO\\_IssuesReview\\_CharterImpact.pdf](http://innovationohio.org/wp-content/uploads/2015/02/IO_IssuesReview_CharterImpact.pdf).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Abbott v. Burke*, 20 A.3d 1018, 1025-26 (N.J. 2011).

own calculations of the funding necessary to provide adequate educational opportunities.<sup>201</sup> Funding transfers to charters only made matters worse in Newark.

In Newark, the percentage of students attending charters tripled between 2008 and 2014, rising from 9% to 28%.<sup>202</sup> The technical oddities in the way the state calculates the dollar amount districts must transfer to charters resulted in Newark going further in the hole with each transfer. Depending on the year, the state formula required Newark to send charters \$1,000 to \$2,000 more per transfer than the district would have received had the student remained in Newark public schools.<sup>203</sup> In other words, the district was suffering a net loss over and above the base loss with each transfer.

Between 2008 and 2014, public school funding in the district fell by \$2,971 per pupil—a 20% cut.<sup>204</sup> A loss of this amount is strong evidence that the Newark may no longer have been providing adequate education opportunities in its public schools (assuming that it was prior to the cuts). State cuts alone brought Newark well below what the state itself had pegged as the funds necessary for adequate education. The required transfers to charters only created a bigger deficit. Newark’s unique struggles are further evidenced by statewide comparison. In 2008–09, Newark was in the top 35% of districts in terms of per-pupil spending, but by 2014 had fallen to the bottom 13%.<sup>205</sup> Newark only avoided falling further by taking on a larger local tax burden.<sup>206</sup>

Newark is not alone. Statewide cuts along with charter transfers had similar effects in Ohio. In Columbus, for instance, the district’s per-pupil expenditures fell from \$9399 in 2007 to \$7905 in 2013, a 15% cut.<sup>207</sup> Florida, however, offers an even more complex and troubling story, as charters and vouchers were both exerting heavy influences in places like Broward County. Between 2008 and 2014, the Broward County’s charter population doubled, rising to 16% of the student enrollment in the district.<sup>208</sup> The voucher population, while much smaller, quintupled. Making matters worse, the state was increasing the funding per voucher, which resulted in a 689% increase in total voucher spending in the county.<sup>209</sup>

As the chart below demonstrates, these rapid voucher and charter increases coincided with substantial drops in public school per-pupil spending in Broward. Thus, not only was the district losing the money associated with departing charter and voucher students, per-pupil spending for the students who remained behind was also shrinking. Between 2008

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<sup>201</sup> *Id.*

<sup>202</sup> Baker, *supra* note 192, at f.20 (providing 2008 data); NAT’L ALL. FOR PUB. CHARTER SCHS., A GROWING MOVEMENT: AMERICA’S LARGEST CHARTER SCHOOL COMMUNITIES App. A (Nov. 2015) [http://www.publiccharters.org/wp-content/uploads/2015/11/enrollmentsshare\\_web.pdf](http://www.publiccharters.org/wp-content/uploads/2015/11/enrollmentsshare_web.pdf).

<sup>203</sup> *ELC Brief*, *supra* note X, at 6–7.

<sup>204</sup> Farrie & Johnson, *supra* note 14, at 1.

<sup>205</sup> *Id.* at 2.

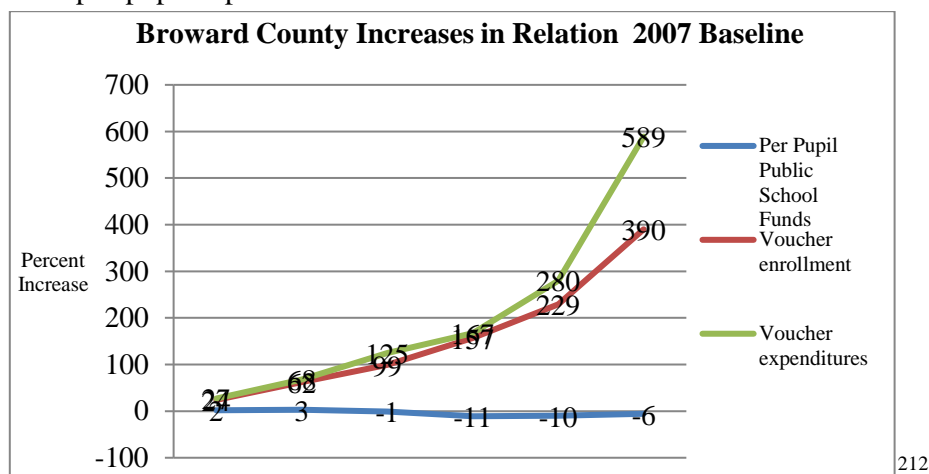
<sup>206</sup> Baker, *supra* note 192, at f34.

<sup>207</sup> *Id.*

<sup>208</sup> *A Growing Movement 2015*, *supra* note 202, at 7.

<sup>209</sup> Calculations based on data in sources in *supra* note X.

and 2011, for instance, Broward per-pupil funding fell from \$9226 to \$8021.<sup>210</sup> As troubling as these trajectories are, Florida passed legislation in 2017 that makes new additional exponential growth in the charter sector possible, risking further downward trends in per-pupil expenditures in Broward.<sup>211</sup>



Recent social science findings suggest that the cuts Newark, Columbus, and Broward experienced likely produced serious academic consequences. Examining decades of school funding and achievement data, Kirabo Jackson found that a 20% increase in per-pupil funding, if maintained over time, produces academic gains that are equivalent to a full additional year's worth of learning.<sup>213</sup> That additional learning eliminates two-thirds of the gap in outcomes between low- and middle-income students.<sup>214</sup> Another study found that a ten percent increase in school funding correlates with a five percent increase in graduation rates.<sup>215</sup> That students in Newark, Columbus, and Broward escaped these harms is unlikely. Reports clearly indicate, for instance, that Newark was forced to cut regular instruction, social work and guidance services, and teaching and support staff—<sup>216</sup> all of which have impacts on student outcomes.

### *B. Stratification of Educational Benefits and Burdens*

The changes in education funding and student market share between the various sectors are also producing further stratification in educational opportunity—financially,

<sup>210</sup> National Center for Education Statistics, District Fiscal Reports, [https://nces.ed.gov/ccd/pub\\_pubdistricts.asp](https://nces.ed.gov/ccd/pub_pubdistricts.asp); NATIONAL CENTER FOR EDUCATION STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2011-12, <https://nces.ed.gov/pubs2014/2014303.pdf>.

<sup>211</sup> Gary Fineout, *Florida Governor Signs Bill to Shift Students, Money to Charters*, U.S. NEWS, June 15, 2017.

<sup>212</sup> Derived from FLA. DEPT. OF EDUC, QUARTERLY REPORTS, *supra* note X; National Center for Education Statistics Reports, *supra* note 210.

<sup>213</sup> Jackson, *supra* note 16, at 162.

<sup>214</sup> *Id.*

<sup>215</sup> Candelaria & Shores, *supra* note 16.

<sup>216</sup> Farrie & Johnson, *supra* note 14.

qualitatively, and demographically. First, because charters schools and voucher enrollment are not proportionally spread across states, they have primarily become the price students living in poor neighborhoods with poor public schools are asked to pay. These students, however, already have the highest needs and typically the most underfunded schools in the state. Thus, the concentrated negative effects of charters are often visited on state's most needy students.

Consider Broward County. Almost half of the district's students are low-income, seventy percent are minority, and nine percent are English Language Learners.<sup>217</sup> It is this type of district that so often disproportionately bears the negative financial impacts and inadequacies noted above. While Broward County only has ten percent of the state's public school population,<sup>218</sup> it has sixteen percent of the state's charter school population.<sup>219</sup> When places like Broward, Newark, and Columbus experience disproportional choice growth and negative financial consequences, the gap between these high-need districts and others in the state only expands.

But even within these individual districts, stratification can occur both in terms of benefits and burdens. As Julia Burdick-Will's study of Chicago found, "it was actually children in affluent neighborhoods who stayed close to home for school. In lower-income neighborhoods, kids in search of better options dispersed to dozens of other schools, often commuting alone for miles."<sup>220</sup> "[W]hen the neighborhood income dropped to less than \$25,000, students dispersed to an average of 13 different schools," with much longer average commute times than their peers. The right to choose a school is not a privilege; the real privilege is "not having to choose" a school.<sup>221</sup> In other words, choice can be a burden that does not necessary include a benefit.

As studies have consistently shown, both charter and private schools are extremely diverse in their quality.<sup>222</sup> About one in five charters outperform their local public school and almost two in five underperform.<sup>223</sup> In Broward County, the bottom end grew so much that it produced an inordinate number of charter closures. Of the entire states' charter school closures, twenty percent occurred there even though only ten percent of students live there.<sup>224</sup> In short, while charters may increase opportunity for some, they apparently

<sup>217</sup> *Broward County Public Schools*, BROADFOUNDATION.ORG, 2008, <http://broadfoundation.org/wp-content/uploads/2016/03/1177-tbp2008browardfactsheet.pdf>.

<sup>218</sup> *PK-12 Public School Data Publications and Reports*, FLA. DEP'T OF EDUC., 2017, <http://www.fldoe.org/accountability/data-sys/edu-info-accountability-services/pk-12-public-school-data-pubs-reports/students.stml>.

<sup>219</sup> *Florida Charter School List by District*, FLA. DEP'T OF EDUC., [http://www.floridaschoolchoice.org/Information/charter\\_schools/Directory/](http://www.floridaschoolchoice.org/Information/charter_schools/Directory/) (Aug. 2, 2017).

<sup>220</sup> Julia Burdick-Will, *Neighbors But Not Classmates*, News Release, Johns Hopkins University (Sept. 2, 2015), <http://releases.jhu.edu/2015/09/02/neighbors-but-not-classmates/>.

<sup>221</sup> *Id.*

<sup>222</sup> Bruce. D. Baker, *Private Schooling in the U.S.: Expenditures, Supply, and Policy Implications*, EPRU: EDUC. POL'Y RES. UNIT (July 2009); CTR. FOR RESEARCH ON EDUC. OUTCOMES, *MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES* (2009).

<sup>223</sup> *MULTIPLE CHOICE*, *supra* note 222.

<sup>224</sup> Calculations derived from this database: *Shattered: Florida's Failed Charter Schools*, NAPLES DAILY NEWS, 2017, <http://mediaassets.naplesnews.com/html/charterschools/database-schoolclose.html?appSession=>

decrease it for others. In doing so, they further stratify the opportunities that students receive within a single school district.

### C. *Segregating Opportunity*

Choice can also have the effect of segregating various demographic groups to particular sectors of the overall school universe and treating them unequally. The segregative effects of charters and vouchers on the whole is muddled because the effects vary so much by state and region,<sup>225</sup> but their segregative effect is strong and clear in particular states and districts. A recent study of North Carolina, for instance, revealed that its entire charter school sector was becoming increasingly white while its public school sector was increasingly populated by students of color. That such a trend would occur on a statewide level is somewhat shocking, but likely a response to the state's particular strong history of integration in the past. Charter schools provide an exit or dissent option for that system. As the study's author wrote, charter schools "are increasingly serving the interests of relatively able white students in racially imbalanced schools."<sup>226</sup>

District level data in other states is equally troubling. School segregation is increasing dramatically in the Twin City metropolitan area of Minnesota. While some of the segregation stems from the district boundaries and assignment policies, charter schools are exacerbating it. In 2013–14, the metropolitan area had 131 charter schools.<sup>227</sup> More than 80% were segregated by race, socioeconomic status, or both.<sup>228</sup> A third had populations that were 95% or more minority.<sup>229</sup> One-fifth were predominantly white.<sup>230</sup> In other words, half the charter schools in the area were segregated by race.

As Newark data reveals, however, segregation and inequality can run much deeper than just race. Segregation and inequality between Newark's traditional public schools and charters occur on multiple levels. African Americans are increasingly leaving for charters, while Latinos remain. The Latino population in charters is less than half of that of public schools, while African American enrollment in charters is 60% higher than in public schools.<sup>231</sup> Charters are also enrolling significantly lower percentages of higher cost students than public schools. Charters' low-income, English language learner, special education, and low-income populations are substantially smaller.<sup>232</sup> In short, the type of

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<sup>225</sup> Compare ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION (Jan. 2010) with Gary Ritter et al., *A Closer Look at Charter Schools and Segregation*, EDUC. NEXT, Summer 2010, at 69.

<sup>226</sup> Helen F. Ladd et al., *The Growing Segmentation of the Charter School Sector in North Carolina*, Nat'l Bureau of Econ. Res., Working Paper No. 21078, 2015), <http://www.nber.org/papers/w21078.pdf>.

<sup>227</sup> Cruz-Guzman v. Minnesota, (Dist. Ct. filed Nov. 5, 2015), <http://lawprofessors.typepad.com/files/minnesota-complaint.pdf>

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> WEBER & RUBIN, *supra* note 59, at 12.

<sup>232</sup> *Id.*



segregation that would be decried if it was occurring within public schools is now occurring between the traditional and charter sectors.

### III. STATES' BASIC EDUCATION DUTY

Whether charter and voucher programs violate state or federal constitutions has long been the subject of litigation and scholarly interest. State constitutions, in particular, include a robust set of state duties and quality and equity principles that the expansion of charters and vouchers implicate. Prior litigation and scholarship, however, has yet to provide any theory that would place serious limits on their growth. That failure stems from the fact that the earliest challenges were speculative. They sought to block the choice programs before they were even implemented. As a result, they had no means of demonstrating the practical and nuanced impacts of choice on the public education system. Compounding the problem, most litigation has simply claimed too much, seeking to absolutely block charters and vouchers. Courts were faced with all or nothing claims and were reluctant to block innovation without first understanding its effects. The following sections provide an overview of relevant constitutional principles and prior claims use of them.

#### A. *State Constitutional Rights and Duties in Education*

A right to education and states' duty to deliver it are embedded in all fifty state constitutions.<sup>233</sup> While many state supreme courts have refused to enforce these rights and duties, reasoning that separation of powers concerns precluded,<sup>234</sup> a majority of courts have.<sup>235</sup> The late 1980s, in particular, marked a turning point, as the legal interpretations of education rights and duties became more precise and the means of measuring them more certain.<sup>236</sup> In twenty-seven cases between 1989 and 2006, plaintiffs prevailed nearly 75% of the time.<sup>237</sup>

The cases typically challenge state funding systems and the quality of education they produce, but the issues raised include vast aspects of the education system. Courts have been asked to resolve disputes ranging from teacher quality and school facilities to

<sup>233</sup> The official number of state constitutions imposing an education duty or right has varied between forty-nine and fifty over the past half-century based on Mississippi's constitutional vacillations because of changes to Mississippi's Constitution. Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 3 (2016).

<sup>234</sup> Scott R. Bauries, *Is There an Elephant in the Room? Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 714-15 (2010) (discussing judicial outcomes and finding that one-third dismiss school finance cases based on separation of powers concerns).

<sup>235</sup> Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500-05 (2007) (discussing the results in state cases and the substantive meaning of the constitutional right to education in those cases).

<sup>236</sup> An oft cited turning point was the Kentucky Supreme Court decision in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). There the court painstakingly detailed the meaning of an adequate education. *Id.* at 212. The decision served as a benchmark for courts in several other states. *See, e.g.*, Alabama Opinion of the Justice, 624 So. 2d 107, 165-66 (Ala. 1993); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); McDuffy v. Secretary, 615 N.E.2d 516, 554 (Mass. 1993); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

<sup>237</sup> Rebell, *supra* note 235, at 1527.

segregation, teacher tenure, preschool, and student suspensions.<sup>238</sup> The cases largely turn on the specific nature of the education right or duty, as interpreted by the court, and the structural and practical implications of the right or duty.

Although the two are not mutually exclusive, scholars and courts have tended to lump the cases into two categories: equity and adequacy.<sup>239</sup> Pure equity claims are simple enough, arguing that unequal access to education resources or opportunities violate the state education clause.<sup>240</sup> An equity claim might challenge the fact that the financing of education through local property taxes results in some districts spending \$10,000 per pupil while neighboring districts spend \$7,000. More sophisticated equity claims focus on ensuring students receive sufficient resources to equal outcomes.<sup>241</sup> A system that provided the exact same resources to low-income and middle-income students would violate equity because low-income students need more resources to achieve the same level.<sup>242</sup>

Adequacy claims, in contrast, focus on identifying a baseline of quality educational opportunities that a state must provide. Various state constitutions indicate that the state must deliver “efficient,” “thorough,” or “sound basic” education.<sup>243</sup> Focusing squarely on these qualitative descriptions, courts have held that state constitutions guarantee students access to a quality or an “adequate” education.<sup>244</sup> Plaintiffs then demonstrate violations with evidence that students are failing to meet the state’s academic standards and that the state fails to provide students with the resources necessary to meet these benchmarks.<sup>245</sup>

Whether focusing on adequacy or equity, the goal of litigants has been to place the education obligation on the state itself, not local communities. As to this point, state constitutions are quite clear, articulating education rights and duties as a first-order obligation of the state. The most aggressive state constitutions provide that education is the “primary,” “paramount,” or most important obligation of the state, whereas others simply describe it as an obligation the state “shall” discharge.<sup>246</sup> These constitutional

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<sup>238</sup> See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); *Vergara v. State*, 202 Cal. Rptr. 3d 262 (Cal. Ct. App. 2016); *Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1096 (Mass. 1995); see also James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308–10 (1999).

<sup>239</sup> Joshua Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014).

<sup>240</sup> See, e.g., *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971); *Horton v. Meskill*, 618, 376 A.2d 359 (1977).

<sup>241</sup> Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REF. 493 (1995)

<sup>242</sup> *Id.*

<sup>243</sup> OHIO CONST. art. VI, § 2 (“(t)he General Assembly shall make such provisions . . . as . . . will secure a thorough and efficient system of common schools throughout the state.”); WEST VIRGINIA CONSTITUTION art. XII, § 1 (“a thorough and efficient system of free schools”); GA. CONST. art. VIII, § 8, para. 1 (“an adequate education”).

<sup>244</sup> *Hoke Cty. v. State*, 599 S.E.2d 365, 373 (N.C. 2004); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326 (N.Y. 2003).

<sup>245</sup> See, e.g., *Abbott v. Burke*, 693 A.2d 417, 425–30 (N.J. 1997) (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system); *Hoke Cty. v. State*, No. 95-CVS-1158, 2000 WL 1639686, at \*10–11 (N.C. Super. Ct. Oct. 12, 2000) (analyzing student performance on standardized state tests and curriculum).

<sup>246</sup> See, e.g., GA. CONST. art. VIII, § 1, para. I; FLA. CONST. art. IX, § 1 (“paramount duty of the state”); NEV. CONST. art. XII, § 6 (requiring education to be funded before any other programs are funded); CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being *essential* to the preservation of the rights and liberties of the people”) (emphasis added); R.I. CONST. art. XII, § 1 (“The diffusion of knowledge, as well as of virtue among the people, *being essential* to the preservation of their rights and liberties, it shall be the duty of the general assembly

phrases and judicial interpretations of them have established that although the practical responsibility for delivering education is delegated to districts, the ultimate constitutional responsibility for education remains with the state.<sup>247</sup> This requires not only that the state provide necessary financial and other resources, but also that it establish standards and policies designed to ensure the proper implementation of those resources. In other words, courts have mandated that the state adopt education policies to guide local districts in carrying out their delegated duties and oversight standards by which the state can hold local districts accountable.<sup>248</sup>

*B. Specific Constitutional Dictates and Provisions*

Beyond these broad concepts of equity or adequacy, courts have applied more precise constitutional concepts and structures. First, most state constitutions include a provision that creates a common fund for public education.<sup>249</sup> Those provisions often limit the programs on which those funds can be spent and the precise manner in which the state should distribute the funds among school districts.<sup>250</sup> Second, many state constitutions establish a state superintendent or board of education and articulate their specific powers and responsibilities.<sup>251</sup> In common fund and state officer and board cases, adequacy or equity concepts are beside the point. The question is simply whether the state is following specific constitutional rules.

Third, numerous state constitutions mandate a “system”<sup>252</sup> of education, “uniform”<sup>253</sup> opportunities and systems, or “common” schools. Logic dictates that these provisions prohibit randomized, completely diverse, unsystematic or locally independent educational opportunities.<sup>254</sup> Yet, absolute uniformity is equally implausible. Thus, these phrases require interpretation to determine how uniform schools must be and in what respects. For instance, a system of education might permit diverse educational opportunities so long as its whole represented a comprehensive system.

Fourth, regardless of how one interprets phrases like uniform, the state’s obligation to provide the system inherently includes a responsibility to engage in administrative planning and oversight. The Kentucky Supreme Court, for instance, indicated that the state’s duty to deliver an efficient education required the state to implement, control, and

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to promote public schools”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) (“a *paramount duty* to make ample provision for the education of all children residing within the State’s borders, the constitution has created a “duty” that is supreme, preeminent or dominant.”).

<sup>247</sup> *See id.*

<sup>248</sup> *See, e.g., Rose*, 790 S.W.2d at 212–13; *Campaign for Fiscal Equity v. State*, 828 N.Y.S.2d 235 (N.Y. 2006); *see also Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1157 (Mass. 2005) (noting that proposed remedies addressed only funding and not the “failing administrative and financial management”).

<sup>249</sup> JOHN MATHIASON MATZEN, *STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776–1929* 129–35 (1931).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 4–14, 36–51.

<sup>252</sup> *Rose*, 790 S.W.2d at 205 (the General Assembly had an “obligation . . . to provide for a system of common schools”).

<sup>253</sup> WYO. CONST. art. VII, § 1; COLO. CONST. art. IX, § 2.

<sup>254</sup> Derek W. Black, *The Constitutional Compromise to Guarantee Education*, STAN. L. REV. (forthcoming).

maintain the education system.<sup>255</sup> Operating on similar logic, other courts have indicated that the state must set academic standards and goals tailored toward delivering the constitutionally required education and supervise the implementation of these standards.<sup>256</sup> A state might delegate certain implementation tasks to school districts, but the state retains the duty to monitor local conditions to ensure its obligation is met.<sup>257</sup> It cannot leave local districts to sink or swim.

Fifth, courts have recognized that a properly planned and managed education system would not just oversee local districts; it would ensure those districts have the resources to meet the constitutional and/or statutory requirements. This can mean identifying the actual cost of delivering an equitable or adequate education, which entails breaking the cost into its constituent components of student need, school district need, and local funding capacity.<sup>258</sup> To be clear, creating a funding system that ensures student needs are met is not an exact science, but the state must, as the Kansas Supreme Court wrote, must develop a funding system that “is reasonably calculated” to allow students to meet state standards.<sup>259</sup>

Cutting against most of these constitutional principles, however, is the judicial recognition that state legislatures retain a great deal of discretion in how they discharge their duties.<sup>260</sup> More specifically, education claims and remedies always operate within the context of separation of powers constraints.<sup>261</sup> Some courts refuse to even entertain plaintiffs’ claims, reasoning that doing so encroaches on legislative discretion.<sup>262</sup> Even when courts intervene, courts are careful to not dictate policies and standards to the state.<sup>263</sup> For instance, a court might declare an education funding system inadequate, but refrain from specifying what the state should do to remedy it.<sup>264</sup> When more than one reasonable solution exists, courts indicate that it is the state’s province, not the court’s, to

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<sup>255</sup> See *Rose*, 790 S.W.2d at 208.

<sup>256</sup> See, e.g., *id.*

<sup>257</sup> See *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Rose*, 790 S.W.2d at 212–14.

<sup>258</sup> See *Campaign for Fiscal Equity v. State*, 828 N.Y.S.2d 235 (N.Y. 2006); *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (1993); *Montoy v. State*, 279 Kan. 817, 840 (2005) (“a determination of the reasonable and actual costs of providing a constitutionally adequate education is critical”).

<sup>259</sup> *Gannon v. State*, 298 Kan. 1107 (Kan. 2014).

<sup>260</sup> See generally William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185 (2003); Bauries, *supra* note 234.

<sup>261</sup> Bauries, *supra* note 234.

<sup>262</sup> See, e.g., *Comm. for Educ. Rts. v. Edgar*, 672 N.E.2d 1178 (1996); *McDaniel v. Thomas*, 285 S.E.2d 156, 160–61 (Ga. 1981).

<sup>263</sup> See generally Bauries, *supra* note 234.

<sup>264</sup> *Id.*; see also *McCleary v. State*, 269 P.3d 227, 232 (2011) (refusing “to specify standards for staffing ratios, salaries, and other program requirements.”).

exercise discretion.<sup>265</sup> And once states implement a remedy, courts have often applied a standard of review akin to reasonableness in evaluating the remedy.<sup>266</sup>

### C. *Prior Constitutional Challenges to Choice Programs*

#### 1. *Charter School Cases*

Plaintiffs have attempted to use the forgoing constitutional provisions to block the creation of charter schools and voucher programs. Most are predicated on the notion that charters and vouchers are inherently inconsistent with the state's constitutional structure for education. In regard to charters, plaintiffs have raised two major categories of claims—one arguing that charters are not public schools and the other that if charters are public, they must be subject to the same state oversight as traditional public schools.

The question of whether charters are public or some other alternative category of schools affects any of number of constitutional constraints. Most notable are the mandates that states establish “common” or “public” schools and that they only spend education funds on common or public schools. If charters are not public schools, the constitution would presumptively prohibit the state from creating or funding charters through typical means.<sup>267</sup> Another variant on these claims is that even if charter schools are public, they are not part of the public education system. Or if they are part of the public education system, they add an serious element of non-uniformity to the system.<sup>268</sup>

With the exception of the Washington Supreme Court, high courts have rejected these challenges,<sup>269</sup> and Washington itself is partly a product of unique prior precedent narrowly defining the meaning of a common school.<sup>270</sup> The courts refuse to adopt a technical or limited definition of common or public schools, reasoning that charters are public because states have labeled and funded them as such.<sup>271</sup> And the fact that charters add variation

<sup>265</sup> See, e.g., *Campaign for Fiscal Equity*, 828 N.Y.S.2d at 244–45; *Hoke Cty. v. State*, 599 S.E.2d 365, 397 (N.C. 2004) (“there is a marked difference between the State’s [conceding] a need to assist “at-risk” students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion”); *McCleary*, 269 P.3d at 231–32 (quoting *Seattle Sch. Dist. v. State*, 585 P.2d 71, 93 (1978)).

<sup>266</sup> See, e.g., *CFE III*, 828 N.Y.S.2d at 244 (upholding state’s plan because it was not “unreasonable”). See also *Serrano v. Priest*, 226 Cal. Rptr. 584 (Cal. Ct. App. 1989) (indicating disparities need only be reduced to insignificant levels and that many inequities are subject to only rational basis review).

<sup>267</sup> *League of Women Voters v. State*, 355 P.3d 1131, 1139–40 (Wash. 2015) (explaining that the Washington Constitution “directs the legislature to establish and fund common schools and restricts the legislature’s power to divert funds committed to common schools for other purposes even if related to education.”).

<sup>268</sup> See *Wilson v. State Bd. Of Educ.*, 89 Cal. Rptr. 2d 745, 752–53 (Ct. App. 1999).

<sup>269</sup> *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 601–02 (Mo. 2010); *Utah Sch. Boards Ass’n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 6, 17 P.3d 1125, 1129–1130 (explaining that the legislature has “plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. This includes any other schools and programs the legislature may designate to be included in the system”); *Wilson*, 89 Cal. Rptr. 2d 745, 752–53 (holding that charter schools are public schools because the legislature defined them as such).

<sup>270</sup> See *School District No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28, 30 (1909) (defining common schools in the absence of any prior legislative definitions).

<sup>271</sup> *Wilson*, 89 Cal. Rptr. 2d at 752; *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 323, 753 A.2d 687, 691 (2000) (“The choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so

among public schools does not negate the fact that a public education system exists.<sup>272</sup> In short, whether charter schools violate the constitutional duty to create and fund public education turns largely on courts' willingness to treat "public" and "common" as terms of art with closely delineated boundaries. Most courts have refused to do so.

The second set of constitutional challenges focus on the state's supervision and control of charter schools.<sup>273</sup> The claim here is a technical one: The wrong person or persons are supervising charters. Charter statutes that place them outside the authority of state and local superintendents and school boards infringes on constitutional authority of these officers and boards.<sup>274</sup> It might also preclude the state from discharging its constitutional duty to supervise and control public schools.<sup>275</sup>

Courts, save one exception, have rejected these arguments, reasoning that charters remain under the authority of state legislature.<sup>276</sup> The legislature created the statutory structure in which charters operate and the legislature can alter that structure any time it wishes.<sup>277</sup> The fact the legislature currently affords charters more discretion than traditional public schools is of no accord. Courts have further noted that charters are not

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long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied."); *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 602 (Mo. 2010) (Explaining that charter schools are public schools because the legislature defined them as such); *State ex. Rel. Ohio Congress of Parents and Teachers, et al. v. State Board of Education* 857 N.E.2d 1148, 1158-59 (Ohio 2006); *See School Board of Palm Beach County v. Florida Charter Education Foundation, Inc.*, 213 So.3d 356, 360 (Fla.5<sup>th</sup> DCA 2017); *see also School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186 (Fla. 5<sup>th</sup> DCA 2008).

<sup>272</sup> *Id.*

<sup>273</sup> *School Board of Palm Beach County v. Florida Charter Education Foundation, Inc.*, 213 So.3d 356, 360-61 (Fla.5<sup>th</sup> DCA 2017); *Utah Sch. Boards Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 6, 17 P.3d 1125, 1129-30; *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933, 938-940 (Colo. 2004); *Council of Organizations and Others for Education about Parochial (MI-1)*, 556 N.W.2d 208, 215-217 (Mich. 1997).

<sup>274</sup> *League of Women Voters*, 355 P.3d 1131; *Wilson*, 89 Cal. Rptr. 2d 745, 753-754; *State ex. Rel. Ohio Congress of Parents and Teachers, et al. v. State Board of Education* 857 N.E.2d 1148, 1161-63 (Ohio 2006) (holding that the Charter Schools Act does not unconstitutionally usurp local school district supervisory authority by creating public charter schools exempt from local supervision); *School Board of Palm Beach County v. Florida Charter Education Foundation, Inc.*, 213 So.3d 356, 360 (Fla.4<sup>TH</sup> DCA 2017) (charter school statute's administrative appeal provision did not violate local school boards' authority under state constitution to operate, control, and supervise all free public schools in school districts, and thus provision was facially constitutional); *see also School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186 (Fla. 5<sup>th</sup> DCA 2008).

<sup>275</sup> *Wilson*, 89 Cal. Rptr. 2d at 754 (reasoning that the charter school act does not preclude the state from discharging its duties because "an overarching purpose of the charter school approach is to infuse the public school system with competition in order to stimulate continuous improvement in all its schools.");

<sup>276</sup> *Council of Organizations and Others for Education about Parochial (MI-1)*, 556 N.W.2d 208 (Mich. 1997); *State ex. Rel. Ohio Congress of Parents and Teachers, et al. v. State Board of Education* 857 N.E.2d 1148, 1161-63 (Ohio 2006); *Utah Sch. Boards Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 6, 17 P.3d 1125, 1129-30. The only exception is a relatively minor decision in *Colorado. Bd. of Educ. in the Denver Sch. Dist. No. 1 v. Booth*, 984 P.2d 639 (Colo. 1999). That decision hinged on a unique constitutional provision that specifically vested substantial control over education decisions in local school boards. The court reasoned that the state board infringed on that local control by forcing the local board to approve a charter.

<sup>277</sup> *In re Englewood*, 727 A.2d at 33; *Council of Organizations*, 556 N.W.2d 208, 219-221; *Utah Sch. Boards Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 6, 17 P.3d 1125, 1129-1130 (explaining that the legislature has "plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system. This includes any other schools and programs the legislature may designate to be included in the system").

free from all oversight; charter authorizers have the power to deny and terminate charters.<sup>278</sup>

The remainder of charter claims has avoided constitutional issues, instead focusing on ensuring that charters and authorizers comply with existing statutes.<sup>279</sup> These claims cover a large spectrum of issues involving the merits of individual charter school applications and the processes and standards for approving them. A statute might, for instance, require an assessment of the community's need for a charter or the economic impact of a new charter on a local district.<sup>280</sup> Charters approved without these assessments are vulnerable to revocation. Plaintiffs have been more successful in these types of cases.<sup>281</sup> And the New Jersey Supreme Court has held that certain statutory charter approval mechanisms are necessary to ensure that the creation of charters in particular locations does not have the effect of depriving students of a constitutional education.<sup>282</sup> With the exception of that case, however, statutory victories in other cases do not represent a fundamental or constitutional limit on charter schools, just a directive to follow the state's already permissive rules.

## 2. Vouchers

Litigation challenging vouchers has followed a similar approach, challenging vouchers based on uniformity clauses and whether the programs are impermissibly funded with public school resources.<sup>283</sup> Voucher uniformity challenges have not been any more successful than charter uniformity claims. Courts reason that the public education system remains in place and voucher programs rest outside it.<sup>284</sup> In other words, plaintiffs are free

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<sup>278</sup> Council of Organizations, 556 N.W.2d 208, 216 (noting that "a charter may be revoked any time the authorizing body has a reasonable belief that grounds for revocation exist."); *Wilson*, 89 Cal. Rptr 2d 745, 754-55 (describing the charter authorization and revocation process).

<sup>279</sup> See, e.g., *Roosevelt v. New York*, 282 A.D.2d 166, 173 (N.Y. App. Div. 2001) (discussing the school board's argument that it is entitled to the funds reserved for it by statute and the charter school act infringes upon the school board's statutory right to those funds); *Shelby Sch. v. Ariz. State Bd. of Educ.*, 962 P.2d 230, 237 (Ariz. Ct. App. 1998) (discussing the statutorily required protocol for resolving a dispute between a charter and its authorizer).

<sup>280</sup> *Consol. Sch. Dist., No. 59 v. Ill. State Bd. of Educ.* 740 N.E.2d 428, 432-434 (Ill. App. Ct. 2000); *Orange Ave. Charter Sch. v. St. Lucie County*, 763 So. 2d 531, 534 (Fla. Dist. Ct. App. 2001) (discussing a charter school's failure to undertake tests required by its charter).

<sup>281</sup> See *Martin*, *supra* note 11, at 92; *Orange Ave. Charter Sch. v. St. Lucie County*, 763 So. 2d 531 (Fla. Dist. Ct. App. 2001).

<sup>282</sup> *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 336, 753 A.2d 687, 698 (2000) ("In sum, we hold that the Commissioner must consider the economic impact that approval of a charter school will have on a district of residence when during the approval process a district makes a preliminary showing that satisfaction of the thorough-and-efficient education requirements would be jeopardized.").

<sup>283</sup> See, e.g., *Jackson v. Benson*, 578 N.W.2d 602, 627-628 (Wis. 1998) (applying the court's interpretation of the Wisconsin Constitution's uniformity clause); *Louisiana Fed'n of Teachers v. State*, 2013-0120 (La. 5/7/13), 118 So. 3d 1033, 1050-1052 (holding the state's funding of a voucher program to be impermissible); *Schwartz v. Lopez*, 382 P.3d 886, 901-03 (Nev. 2016) (explaining that the state's voucher program could be permissible, but not under the appropriation scheme used); see also Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 726 (2015).

<sup>284</sup> *Meredith v. Pence*, 984 N.E.2d 1213, 1221-25 (Ind. 2013); see also *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

to challenge the uniformity of the public education system, but a voucher program does not necessarily speak to that issue. Indiana emphasized, for instance that the state constitution obligates the state to both encourage education through all suitable means and set up a uniform education system.<sup>285</sup> Those two duties are not mutually exclusive and, thus, do not preclude vouchers.<sup>286</sup> Other courts have offered similar rationales in rejecting uniformity challenges to vouchers.<sup>287</sup>

Attacking the source of voucher funding has been successful in a few states.<sup>288</sup> Florida's constitution, for instance, mandates a "uniform . . . and high quality system of free public schools"<sup>289</sup> and its statutes earmark particular taxes to fund the public school system. In 2002, the legislature took funds directly from those public school revenues and diverted them to vouchers.<sup>290</sup> The state supreme court held that the diversion of these funds was unconstitutional because those funds were reserved for the provision of a uniform and adequate public education system and could not be used to create an alternative voucher system.<sup>291</sup>

More recently, the Nevada Supreme Court noted a similar problem with the state's voucher program. While Nevada's program did not violate the uniformity clause, the program violated constitutional funding rules.<sup>292</sup> The state constitution makes public education funding priority number one.<sup>293</sup> The state, however, had taken money from public education and diverted it to vouchers without first having established that all of public education's needs would be met.<sup>294</sup>

It is also worth noting that state constitutional prohibitions on the flow of public money into religious institutions once provided a clear limit on the type of schools that could accept vouchers.<sup>295</sup> Those prohibitions, however, may no longer be of practical import.

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<sup>285</sup> *Meredith*, 984 N.E.2d at 1221–25.

<sup>286</sup> *Id.*

<sup>287</sup> See *Hart v. State*, 774 S.E.2d 281, 289–90 (2015) (holding that the uniformity clause applies to the public school system and does not prevent the legislature from funding private initiatives); *Davis v. Grover*, 480 N.W.2d 460, 473–74 (1992) (uniformity clause requires public education and vouchers are simply an attempt "to do more than that which is constitutionally mandated" not less); *Schwartz v. Lopez*, 382 P.3d 886, 892 (Nev. 2016).

<sup>288</sup> *Louisiana Fed'n of Teachers*, 118 So. 3d 1033; *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Schwartz*, 382 P.3d at 902; *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933 (Colo. 2004) (holding that a legislative scheme that requires school districts to pay a certain amount of money to parents of students attending underperforming schools so that said parents can use that money to pay tuition at nonpublic schools is an unconstitutional violation of the school finance provision). Plaintiffs have also won based on constitutional provisions preventing public funds from flowing to religious institutions, but those are distinct from the issues raised in this paper. See, e.g., *Cain v. Horne*, 202 P.3d 1178 (Az. 2009). Those court decisions are also on weak footing following a recent U.S. Supreme Court decision limiting states in their ability to exclude religious groups from participating in certain public funding programs. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 US \_\_\_\_.

<sup>289</sup> FLA. CONST. art. IX, § 1(a).

<sup>290</sup> *Bush*, 919 So.2d at 392.

<sup>291</sup> *Id.*

<sup>292</sup> *Schwartz*, 382 P.3d at 902 (holding that public schools must be funded prior to appropriating funds to the state voucher program)

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> See, e.g., *Taxpayers for Pub. Educ. v. Douglas Cty.*, 351 P.3d 461, 3, *cert. granted, judgment vacated*, No. 15-557, 2017 WL 2742829 (U.S. June 27, 2017)



First, states have used tax credit schemes to avoid the problem.<sup>296</sup> Second, a recent U.S. Supreme Court decision suggests that state laws directly excluding religious institutions from funding programs may be unconstitutional.<sup>297</sup>

The advent of these tax credit schemes, moreover, may undercut the basic education clause claims as well. To the extent that the problem in Florida and Nevada was the source of the funds, tax credit schemes may resolve the problem. In fact, the Florida Supreme Court has already held as much. Given that states have increasingly moved toward this model of funding vouchers, the cases in Nevada and Florida may be of little precedential value. In short, constitutional challenges raised thus far have provided little if any practical limit on the expansion of voucher programs.

### 3. *Flaws of Prior Claims*

Prior litigation, on the whole, has been a failure. Even the rare victories have been cut short by legislative work-arounds.<sup>298</sup> The flaw of the litigation may be that it simply claims too much—that state constitutions prohibit charters and vouchers entirely. If courts accepted the claim that charters were not public schools, for instance, constitutional doctrine could preclude them entirely. Likewise, if courts accepted the notion that vouchers necessarily operate at the expense of public schools, constitutional doctrine would likely preclude them.

Stances of these sorts are ones courts are loath to make, particularly when they can avoid it. Courts have explicitly acknowledged that voucher and charter challenges draw them into hotly contested political issues.<sup>299</sup> Thus, courts have emphasized that their decisions are not about the academic merits charters or vouchers themselves.<sup>300</sup> Instead, courts purport to base their decisions on constitutional doctrine alone. Yet, the constitutional claims plaintiffs have raised would end the political debate and foreclose states from pursuing policies that might very well prove academically beneficial in some instances.<sup>301</sup>

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<sup>296</sup> Levin, *supra* note.

<sup>297</sup> *Trinity v. Lutheran Comer*, [https://www.supremecourt.gov/opinions/16pdf/15-577\\_khlp.pdf](https://www.supremecourt.gov/opinions/16pdf/15-577_khlp.pdf).

<sup>298</sup> Levin, *supra* note.

<sup>299</sup> *State ex. rel. Ohio Congress of Parents and Teachers, et al. v. State Board of Education* 857 N.E.2d 1148, 116659 (Ohio 2006); *Meredith v. Pence*, 984 N.E.2d 1213, 1216 (Ind. 2013); see also *Wilson v. State Bd. Of Educ.*, 89 Cal. Rptr. 2d 745, 755, 760 (Ct. App. 1999) (indicating the state was exercising its discretion to experiment in uncharted territory).

<sup>300</sup> *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) (stating that “As a general rule, courts may not reweigh the competing policy concerns underlying a legislative enactment. The arguments of public policy supporting both sides in this dispute have obvious merit, and the Legislature with the Governor’s assent has resolved the ensuing debate in favor of the proponents of the program.”); *League of Women Voters v. State*, 355 P.3d 1131 (Wash. 2015); *Meredith v. Pence*, 984 N.E.2d 1213, 1216 (Ind. 2013) (the court stated “Our individual policy preferences are not relevant. In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process.”)

<sup>301</sup> See, e.g., John Bruno, Inez Fletscher Stepman, *An “Unconscionable Decision”*, Nov. 23, 2015, <https://www.alec.org/article/an-unconscionable-decision-league-of-women-voters-et-al-v-state-of-washington/> (decrying the court for shutting down the policy debate in the state); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1147, 89 Cal. Rptr. 2d 745, 760 (1999) (“while it is obvious that appellants wish for more—and more detailed— standards and guidelines, more could not be better in this situation where a primary purpose of the Act

## PREFERENCING EDUCATIONAL CHOICE

In this context, courts appear to construe the facts and law more favorably to the state than they might in a typical adequacy or equity case. In doing so, they have permitted the political process, rather than courts, to sort out the best way to develop and manage choice programs. Two decades later, political support for school choice has penetrated so deeply that it is hard to imagine courts reversing this course.<sup>302</sup> The train has, so to speak, already left the station on the question of whether state constitutions allow states to establish and fund charter schools and voucher programs. Even if constitutional logic would dictate otherwise, the judicial answer will be yes.

The question now is whether the constitutional debate over school choice can be reframed from one premised on an all-or-nothing approach to a more nuanced one that relates to how choice programs actually affect the public education system. Without this reframing, advocates need not waste their time in court (save in states with idiosyncratic precedent). Fortunately, evidence like that developed in Parts I and II provide strong evidence upon which to reframe the constitutional issues. This reframing, moreover, would allow courts to place limits on choice programs without precluding them.<sup>303</sup> Such an approach is, likewise, consistent with school funding precedent, which includes very few absolutes and rests instead on a close examination of how state policy affects educational opportunities in particular schools.

### IV. THEORIZING THE CONSTITUTIONAL LIMITS OF CHOICE

If any limit exists on choice programs, it is how they relate to and affect educational opportunity in the public education system. Prior claims have attacked choice as problematic in and of itself, whereas this approach asks the same question that all prior equity and adequacy litigation has: is the state delivering adequate and equitable educational opportunities? If not, what policies are causing these deprivations? The state's motivations and rationale for its policies are irrelevant if the net result is a failure to provide appropriate educational opportunities. A court might strike down the implementation of a charter system and demand reform in the same way that it has struck down state funding formulas and demanded that they be rewritten. In doing so, courts do not preclude any particular form of school funding or school choice; courts simply demand that the state's chosen policies produce outcomes consistent with the constitution.

To make this showing, however, claims must become far more factually granular. Plaintiffs cannot assume that choice programs inherently harm public education. They must show it. This requires more than simply pointing to the competition between

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is to encourage educational innovation, experimentation and choice in order to improve learning and expand learning opportunities for all students. How can you write the score to a symphony yet to be created?").

<sup>302</sup> See Minow, *supra* note 26 (analyzing the seductive allure of choice programs).

<sup>303</sup> The New Jersey Supreme Court offered a strong nod in this direction, finding that the state's charter school legislation was not unconstitutional on its face, but the failure to diligently examine the effect of new charter schools on segregation and the local delivery of thorough and efficient education opportunities could violate the constitution. *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 164 N.J. 316, 336, 753 A.2d 687, 698 (2000).

traditional public schools and choice programs or the rapid flow of resources into choice. Plaintiffs must demonstrate that choice programs are actually causing or connected to inadequate or inequitable educational opportunities in particular schools. Statewide data alone will not do this, as choice programs remain relatively small at that level.<sup>304</sup> But at the district level, the facts developed in Part II strongly suggest that negative effects of a constitutional dimension are occurring.

While these negative effects offer the strongest claim, these effects are not happenstance. States have created a statutory structure that has incentivized rapid and unconstrained choice growth.<sup>305</sup> These incentives give rise to a second constitutional claim: whether states' motives are legitimate. Creating vouchers and charters to provide specialized or potentially improved opportunities is one thing. Creating incentives to drive students away from public schools and toward an alternative is entirely different. The creation of choice programs may amount to no more than an alternative, which courts have generally sanctioned as appropriate.<sup>306</sup> But alternatives that seek to elevate or preference private choice in relationship to public education system are something else altogether. The state's objective might be illegitimate and be precluded by school finance precedent, if not explicit constitutional language. Because the preference helps give rise to the effects, the following sections take up the former first.

#### A. A Prohibition on Preferring Private Choice

Public education's special constitutional standing offers strong support for the principle that states are prohibited from preferencing alternatives to the public education system. The constitutional text and precedent in a great number of states make clear that education holds a priori status. Some constitutions and courts imply this status, emphasizing that education is "essential" to the preservation of democracy, a "fundamental" right of the people, and a duty of the state.<sup>307</sup> Others imply this status in the way they apply the constitution, rejecting legislative whims and excuses as a basis from noncompliance with a state's education duty.<sup>308</sup> As noted earlier, several state constitutions are explicit, providing that public education is the state's "paramount,"

<sup>304</sup> National Center for Education Statistics, *supra* note 12.

<sup>305</sup> See *infra* notes.

<sup>306</sup> See generally Mead, *supra* note (cataloguing voucher cases); Martin, *supra* note (cataloguing charter cases); See, e.g., Meredith v. Pence, 984 N.E.2d 1213, 1221-25 (Ind. 2013); Wilson, 89 Cal. Rptr. 2d 745.

<sup>307</sup> See, e.g., CAL. CONST. art. IX, § 1 ("essential to the preservation of the rights and liberties of the people"); R.I. CONST. art. XII, § 1 ("being essential to the preservation of their rights and liberties."); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (recognizing a fundamental right); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 71 (Wash. 1978) (same); Washakie Cty. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) (same).

<sup>308</sup> Rose v. Council for Better Educ., 790 S.W.2d 186, 208 (Ky. 1989) ("[T]he financial burden entailed in meeting [education] responsibilities in no way lessens the constitutional duty"); Campbell Cty. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) ("All other financial considerations must yield until education is funded."); Claremont v. Governor, 794 A.2d 744, 754 (N.H. 2002) ("financial reasons alone [do not excuse] the constitutional command that the State must guarantee sufficient funding to ensure . . . a constitutionally adequate education"); Abbott v. Burke, 798 A.2d 602, 603-04 (N.J. 2002) (rejecting state's request for budgetary cap on education to ease other constraints).

“primary,” or first obligation.<sup>309</sup> The Vermont Supreme Court may have best explained just how special education is: “Only one governmental service—public education—has ever been accorded constitutional status in Vermont.”<sup>310</sup> In these states, legislation that preferences an alternative to public education should violate education’s a priori status.

Yet, even outside states with such clear language, logic still dictates that states cannot preference alternatives to the public education system. The provision of public education stands as an absolute state duty. As such, states lack the authority to directly or indirectly resist that duty. A refusal to fund public education at all would directly violate the constitutional duty. A legislative structure that indirectly sought or created the means to eliminate public education should be equally unconstitutional. Consider, for instance, legislation that financially incentivized every student in the state to opt for private education. While that program does not formally eliminate public education, such a program could eliminate public education—at least in certain locations. Even without a preference for private education, simply placing private choice on an equal playing field with public education treats choice not just as an alternative to public education, but as an equal option. Full equality between public education and private education renders the delivery of public education contingent on private rather than public action. As such, the state is taking action inconsistent with an absolute duty to provide public education. In short, education’s special constitutional status logically requires that states put education ahead of other agendas.

That states cannot preference alternatives to public education would appear constitutionally uncontroversial. The more difficult is what amounts to legislative action that consigns education to second-class status. In addition to the examples above, obvious examples include funding other lesser programs (like transportation or health) ahead of public education, willingly failing to fully fund education needs, and cutting education in excess of or equal to other programs to balance the state budget.<sup>311</sup> Other examples are far more contextual. Prior voucher and charter cases, for instance, have permitted choice programs that rely on money that would have otherwise gone to public education.<sup>312</sup> While one could argue that shifting funds from public education to choice negates education’s first-order status, those funds follow students who are no longer in the public schools.<sup>313</sup> So long as the public schools retain necessary funding to serve their students, the funding

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<sup>309</sup> FLA. CONST. art. IX, § 1 (“paramount duty”); GA. CONST. art. VIII, § 1, ¶I (“primary obligation”); NEV. CONST. art. XII, § 6 (requiring the state to fund education before any other program); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 91 (Wash. 1978) (“a paramount duty”); *Campbell Cty.*, 907 P.2d 1238 at 1259 (“a long-cherished principle” that “was viewed as a means of survival for the democratic principles of the state.”).

<sup>310</sup> *Brigham v. State*, 692 A.2d 384, 391-92 (Vt. 1997). See also *W.Va. Educ. Ass’n v. State*, 369 S.E.2d 454 (W.Va. 1988) (emphasizing education’s preferred constitutional status in striking down the state’s across the board cuts to state programs).

<sup>311</sup> See Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423 (2016) (analyzing state funding priorities in relation to education).

<sup>312</sup> See, e.g., *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999); *Meredith v. Pence*, 984 N.E.2d 1213, 1221-25 (Ind. 2013).

<sup>313</sup> For a charter advocate making that point, see National Alliance for Public Charter Schools, *Separating Fact and Fiction* 10 (2014), <http://www.publiccharters.org/wp-content/uploads/2014/08/Separating-Fact-from-Fiction.pdf>.

shift is not per se inconsistent with education's first-order status. In these circumstances, plaintiffs would need to show an educational deprivation in the public schools themselves.

In contrast, the constitutional line of preference is seemingly crossed when the state not only expresses a willingness to transfer funds to choice but also institutes policies that heavily tilt the scales in favor of alternatives to the public education system. In other words, the state does more than make alternatives to the public education system available; its legislative scheme reveals that the state wants students to exercise those alternatives and, in fact, may incentivize students to leave public education. The following subsections further explore what these motives and incentives look like.

### 1. *Motivational Preferences*

A preference for choice over public education might be evident in two categories of cases. The first is when the legislature expresses that preference or acts in response to a particular set of circumstances that make that preference evident. The second category involves an assessment of choice programs in relationship to public education to determine whether choice programs operate with systemic advantages. In other words, the first example is a question of legislative motive and the second is one of statutory effect.

While choice has garnered significant political capital, a governmental preference for choice begs the question of governmental motive. From an institutional and constitutional perspective, a government preference for private choice is antithetical. It is hard to posit a legitimate reason why government would ever pass legislation that preferences options that would detract from citizens' access to their central constitutional right to education. At least three unsavory explanations, however, arise.

The first explanation is simply the state's unwillingness to meet its constitutional education duty. In other words, it is not that the state prefers vouchers or charters, but that the state does not want to live up to its education duty. By creating alternatives to the public system, the state may shrink the number of students to whom it owes a duty and obscure the fact that it is not carrying out its public education duty. In both instances, the state may also be shrinking the total funds it spends on education—a related objective.

Evidence suggests that this is a significant motivation in several states. Consider, for instance, that constitutional precedent requiring equal and adequate educational opportunities was at a high-water mark immediately before the Great Recession.<sup>314</sup> While states did not always readily comply, precedent was steadily demanding that states increase their fiscal outlays for public education.<sup>315</sup> When the recession hit, states drastically cut their budgets for public education,<sup>316</sup> likely committing a number of constitutional violations.<sup>317</sup> Yet, it was during that very period that states drastically expanded their financial outlays for charter schools,<sup>318</sup> which at the time produced per-

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<sup>314</sup> Rebell, *supra* note 235.

<sup>315</sup> *Id.*

<sup>316</sup> LEACHMAN ET AL., *supra* note 174.

<sup>317</sup> Black, *supra* note 309.

<sup>318</sup> *See supra* notes X.

pupil savings for the state.<sup>319</sup> In other words, states having difficulty facing their increasing constitutional duties with dwindling resources quickly moved the responsibility for educating a substantial portion of their students to third parties at a lower price.

The possibility of ulterior motives with voucher is older and more obvious. During the 1990s, Ohio, for instance, was facing two different serious legal challenges to the quality of their public schools. A lengthy trial detailed extensive qualitative and financial failings across the state.<sup>320</sup> Based on those facts, the Ohio Supreme Court found that the state's financing system was failing to ensure the constitutionally required "thorough and efficient" education opportunities. It ordered the state to "create an entirely new school financing system;" recognize its duty to maintain a statewide system of education; and "place[ education] high in the state's budgetary priorities."<sup>321</sup> During the same time, a federal court found Cleveland to be "among the worst performing public schools in the Nation" and ordered the state to take control of the district to address what the court and state auditors termed an acute "crisis."<sup>322</sup>

In this context, the state enacted its first voucher program—one that would serve a select number of students.<sup>323</sup> What the state did not do was fix the public education system.<sup>324</sup> The state supreme court would declare the state's legislative fixes insufficient and unconstitutional three more times over the next five years.<sup>325</sup> The most forgiving explanation was that the state wanted vouchers to create immediate relieve for willing students. The other explanation is that the state was not committed to providing systemic relief and enacted vouchers as a distraction and potentially a means of dividing the constituency most affected by inadequate education.<sup>326</sup>

More recently, other states have promoted voucher expansion as a means of saving the state money. Curiously, a number of states already demonstrating a meager commitment to public education in general lead that charge. Arizona and Nevada, for instance, operate some of the most underfunded and inadequate education systems in the country.<sup>327</sup> Yet, they were the first to propose a radically new type of voucher program that would authorize shifting every student into a voucher.<sup>328</sup> Doing so could practically eliminate the state's public education responsibility. At the very least, it would, as the

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<sup>319</sup> See PATRICK J. WOLF ET AL., THE PRODUCTIVITY OF PUBLIC CHARTER SCHOOLS (July 2014).

<sup>320</sup> *DeRolph v. State*, 78 Ohio St. 3d 193, 213 (Ohio 1997).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> In Cleveland, 3,700 students received a voucher, *id.* at X, which was roughly 5% of the district's population. *Enrollment Data*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Data/Frequently-Requested-Data/Enrollment-Data> (last visited July 28, 2017).

<sup>324</sup> McDonald, *supra* note (Ohio continues to experiment with choice, but will not support public education system).

<sup>325</sup> *DeRolph*, 78 Ohio St. 3d at 213; 83 Ohio St. 3d 1212 (Ohio 1998) [*DeRolph* II, III, and IV].

<sup>326</sup> McDonald, *supra* note; see also Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1107-09 (2014) (analyzing why African Americans—a group heavily committed to public education, would support vouchers and charters).

<sup>327</sup> BAKER, SCHOOL FUNDING FAIRNESS, *supra* note.

<sup>328</sup> See *supra* notes.

primary proponents in Arizona emphasized, save the state money over time.<sup>329</sup> Once the students were in private education, the state could cap the voucher allotments and hold the state's investment in education at its already low levels.<sup>330</sup> A similar rationale has been offered in other states as a reason for pushing vouchers for the states' most costly students—students with disabilities.<sup>331</sup>

The second explanation for a state's decision to preference choice is that the public demands it. Yet, the public demands it in many instances because the public education system itself is inadequate. Exploring why African Americans in particular have tended to support school choice options, Osamudia James explained that “[f]or racial minorities, access to quality public schools is not nearly as assured as it is for many white students and their families.”<sup>332</sup> African Americans have supported choice not as an inherently desirable policy but due to the “lack of reasonable alternatives.”<sup>333</sup>

Public support borne out of the fact that the state is not meeting its constitutional education obligations does not absolve the state in preferencing choice. This public support is part of a vicious feedback loop in which the state's unwillingness to provide adequate educational opportunities creates artificial demand for choice, which, if met, advantages the state because it will no longer be on the hook for educating those families. Absolving the state under these circumstances is akin the absolving school boards that purported to segregate schools, not because they were racist, but because their constituents demand it. In that context, courts flatly rejected the state's attempt to absolve itself.<sup>334</sup>

To be clear, however, public support for choice is not reserved to disadvantaged groups. Charter and voucher programs garner widespread support across various groups.<sup>335</sup> Accounting for the broader support is more difficult. The broader support raises the possibility of a third contributing explanatory factor: groups other than the disadvantaged are dissatisfied with public education. Embedded in this explanation is the more troubling possibility that, for many, support for choice grows out of an anti-equality sentiment. In fact, school choice initially developed as a direct response to school

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<sup>329</sup> Rob O'Dell & Yvonne Wingett Sanchez, *School-Voucher Expansion Could Cost Arizona \$24M a Year or More*, THE REPUBLIC, Feb. 27, 2017, <http://www.azcentral.com/story/news/politics/arizona-education/2017/02/17/arizona-school-voucher-expansion-costs/97965256/>

<sup>330</sup> *Id.*

<sup>331</sup> Raj, *supra* note.

<sup>332</sup> James, *supra* note 324, at 1107.

<sup>333</sup> *Id.*

<sup>334</sup> *U.S. v. Virginia*, 518 U.S. 515 (1996) (emphasizing the court had rejected the idea that African Americans could be kept out of white schools because they would face discrimination and making the same point in regard to gender discrimination); *See also Romer v. Evans*, 517 U.S. 620 (1996).

<sup>335</sup> Kimberly Hefling, *POLITICO-Harvard Poll: Americans Favor Charter Schools—But Not at Public Schools' Expense*, POLITICO, May 3, 2017, <http://www.politico.com/story/2017/05/03/politico-harvard-poll-americans-favor-charter-schools-but-not-at-public-schools-expense-237940>; Paul E. Peterson et al., *Ten-Year Trends in Public Opinion from the EdNext Poll*, EDUCATIONNEXT (2017), <http://educationnext.org/ten-year-trends-in-public-opinion-from-ednext-poll-2016-survey/>.

desegregation, as states and localities sought strategies to thwart the process.<sup>336</sup> School choice then faded, as desegregation itself faded.<sup>337</sup>

Yet, the resurgence of choice roughly corresponds with the overall increasing demands of equality in its various forms.<sup>338</sup> This is not to say that public schools provide equal educational opportunity, but they are more equal now than before and constitutional and statutory demands are higher. Equality, however, presents a problem for the privileged. Equality can be achieved by leveling disadvantaged students up or leveling advantaged students down. Both, however, entail the elimination of advantages for formerly privileged groups.<sup>339</sup> And eliminating relative status privilege exacerbates and intensifies demands for new forms of stratification.<sup>340</sup> Ironically, when advantaged classes feel safe in their status, they are more willing to be benevolent towards disfavored groups. But when that status and privilege erode, “they are increasingly replaced by new forms of status competition.”<sup>341</sup>

To the extent status conflict is occurring, choice programs may placate it. They theoretically free middle-class families from public schools that they either perceive to be qualitatively inadequate or relationally too equalized. Choice also provides two potential positive goods for the privileged: public financing for private school costs that the privileged would have otherwise borne themselves and facilitating privileged groups who otherwise would have attended more diverse public schools into more heterogeneous charter schools or voucher programs. The former reinforces existing privilege while the latter creates new privilege.

Sorting out which of the foregoing motives are at play in any given state is beyond the scope of this Article. But to the extent any motivate the state to preference private choice over public education, they represent likely constitutional violations. The point here is to recognize these motivations as such.

## 2. *Preferential Effects*

Regardless of states’ motivation, their statutory structure might, as a practical matter, preference choice. Choice programs can entail such a systematic set of advantages that remaining in the public school system would be an irrational choice for families to

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<sup>336</sup> See, e.g., *Green v. New Kent Cty.*, 391 U.S. 430 (1968); see also BRIAN J. DAUGHERITY & CHARLES C. BOLTON, WITH ALL DELIBERATE SPEED: IMPLEMENTING *BROWN V. BOARD OF EDUCATION* 132 (2008); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 730 (1986).

<sup>337</sup> See generally Wendy Parker, *The Future of School Desegregation*, 94 NW U. L. REV. 1157 (2000) (evaluating the decline in school desegregation).

<sup>338</sup> See generally Minow, *supra* note 6, at 257 (1999) (revealing how choice came on the heels of equality paradigms that had purportedly failed).

<sup>339</sup> As Jack Balkin explains, “One cannot increase the status of one group without decreasing the status of another. High prestige is prestige over others and in distinction to others. Increased respect for lower status groups means a corresponding loss of respect for higher status groups because their identity has been constructed around their greater prestige and the greater propriety of their ways of living.” Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*; see also Jack M. Balkin, *The Constitution of Status—Part II* (1997), <http://jackbalkin.yale.edu/constitution-status-part-ii>.



make.<sup>342</sup> In other words, the question is whether families faced with pursuing a voucher or remaining in the public school would see the voucher program as practically a better deal. Cleveland, again, offers an interesting context for exploring this question.

When Cleveland's traditional public schools were in crisis, the monetary value of the voucher was still relatively small and left families responsible for a portion of the tuition.<sup>343</sup> This likely made vouchers appealing to a relatively small subset of students. Further complicating the choice was the fact that many private schools would not accept the voucher—due either to its low reimbursement rate and/or the students it would bring.<sup>344</sup> This left private religious schools as nearly the only ones in which students used vouchers.<sup>345</sup> These facts would suggest that even if the state held illegitimate motives (which it may have), its voucher program did not create a significant practical advantage for choice. On the other hand, simply changing the value of the voucher could change this equation. Far more students would have sought a voucher and far more schools would have likely accepted them.

At some point, a practical preference for choice becomes hard to distinguish from choice programs that undermine public education as a practical matter. The primary distinction is that establishing a preference does not require a showing that students in the public education system are being denied the constitutionally required education. Yet, demonstrating a preference still requires a comparative analysis between choice programs and public education that draws on the same evidence as a claim premised on undermining public education. In the interest of brevity, this Article turns to the undermining claim, while reserving that those same facts might establish a narrower preference claim.

### *B. Choice that Impedes the Delivery of Adequate and Equitable Public Education*

The conceptually and factually more direct challenge to choice programs is that they impede the delivery of constitutionally required public education opportunities. Again, the claim is not that charters or vouchers are per se barred, but that as a practical matter, the state's statutory structure for choice programs is undermining public education. This claim requires evidence of the precise effects of choice on public education in particular locations.

#### *1. Existential Threats*

The most salient challenges would demonstrate one of three things occurring at the district level. First, evidence might demonstrate that choice programs are creating an existential threat to and/or systematically replacing public education in particular districts. A fallacy of prior approaches has been to look at voucher and charter programs on a statewide basis. At that level, however, their effect is diluted and misleading, and

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<sup>342</sup> See, e.g., Black, *supra* note 126.

<sup>343</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>344</sup> See *id.*

<sup>345</sup> *Id.*

destructive claims about them overblown. Traditional public schools in most states still hold over 90% of the education market.<sup>346</sup> Including charters, every state's public education system holds 90% of the market.<sup>347</sup> Thus, no statewide existential threat exists.

But at a local level, existential threats may very well exist.<sup>348</sup> New Orleans, most notably, became a system entirely comprised of charter schools.<sup>349</sup> Traditional public schools simply ceased to exist. No other locality comes close to that percentage of charters yet, but the upward trends in places like Detroit, Flint, Philadelphia, and Newark indicate that it is a possibility there.<sup>350</sup> In fact, Detroit and Flint recently became majority charter districts.<sup>351</sup>

At current enrollment levels, voucher programs fall short of existentially threatening public education. Yet, recent statutory programs in places like Nevada and Arizona contemplate that threat, authorizing every public school student to exit the system.<sup>352</sup> States cannot argue that these students are still part of the public education system. Moreover, these new state programs place even less oversight on voucher growth than charter growth. The only real constraint is the willingness of students and private schools to accept them.

For the state to carry out its constitutional obligations in regard to public education, it has to maintain a public education system across all districts.<sup>353</sup> Otherwise, traditional public education becomes a happenstance of where one lives, rather than a constitutional guarantee.<sup>354</sup> Likewise, the demise of traditional public schools means the demise of local school boards, superintendents, and overall democratic control of education, which several state constitutions specifically mandate.<sup>355</sup> Again, a state might permissibly create alternative to public schools and even place them outside the oversight of state officers, but it cannot eliminate traditional public schools and state oversight altogether. In short,

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<sup>346</sup> National Center for Education Statistics, *supra* note, at f.3.

<sup>347</sup> BRUCE BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 25 (2d 2012).

<sup>348</sup> In Louisiana, for instance, charters are only about 10% of the overall public school sector. *Measuring Up*, *supra* 101. No matter what substantive critique one might offer of charters or their effect on the overall public education system, it is hard to argue that charters are undermining public education or violating other constitutional principles on a statewide basis in the state. The analysis might look quite different at the local level. New Orleans, for instance, transitioned from a system of traditional public schools to one that is now entirely comprised of charters. Layton, *supra* note 1. Background precedent in Louisiana was unfavorable to a constitutional challenge, but in another state, these facts could have easily lent themselves to constitutional challenges.

<sup>349</sup> *Id.*

<sup>350</sup> *A Growing Movement: America's Largest Charter Public School Communities and Their Impact on Student Outcomes*, Nat'l All. for Pub. Charter Schs. (2016), <http://www.publiccharters.org/wp-content/uploads/2016/11/enrollment-share-web1128.pdf> [hereinafter *A Growing Movement 2016*]; *A Growing Movement 2015*, *supra* note 202.

<sup>351</sup> *A Growing Movement 2016*, *supra* note 350.

<sup>352</sup> *See, e.g., supra* note.

<sup>353</sup> *See* *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) (emphasizing the states duty in regard to the entire public school system).

<sup>354</sup> *See, e.g., Horton v. Meskill*, 618, 376 A.2d 359 (1977) (decrying the vast disparities in educational opportunity based on geography); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (detailing vastly different educational resources between districts separated by a very short distance).

<sup>355</sup> *See generally*, Matzen, *supra* note.

statutory policies that, as a practical matter, eliminate public schools on a systemic basis in particular jurisdictions are antithetical to the proper discharge of the state's duty.

## 2. *Deprivations of Educational Opportunity*

A milder version of the existential threat claim is that choice policies are a causal factor in public schools failing to deliver a constitutionally required education or falling even further below that threshold than they previously were. The claim is not that public education will cease to exist in a district, but that quality of education in the district persists at an inferior level because of the effects of choice programs. This claim closely mirrors a typical school quality or equity claim with the only major distinction being the particular state policy causing the constitutional deprivations.<sup>356</sup>

As detailed in Part II.A., state support for public education has decreased significantly in number of states. That decrease, however, is concentrated and intensified in districts with substantial choice programs. These districts have seen per-pupil revenues in traditional public schools decline by 10% to 20% in just a few years, which social science and even states' own calculations indicate are sufficient to deprive students of adequate and equal educational opportunity.<sup>357</sup>

The cuts represent the constitutional deprivation. The next step is to identify the cause. To be clear, choice programs are not entirely to blame for the deprivations. States have simply been willing cut education to balance budgets in other state programs.<sup>358</sup> But choice programs are also a significant cause of the deprivation in places like Newark, Philadelphia, and Columbus. The statutory reimbursement system in those states actually drives per-pupil funding in traditional public schools down with each transfer to a charter.<sup>359</sup> In addition, state decreases in support for traditional public education have corresponded with per-pupil funding increases for charters and vouchers in several states. While the causal link is not as direct at that level, the states are, in effect, taking money from traditional public education and giving it to choice programs.

## 3. *Breaching Equality, Uniformity, and Access Through Stratification*

Finally, choice programs that stratify educational opportunity within the overall universe of state-sponsored educational opportunities produce another distinct constitutional violation. The stratification can manifest itself in a number of ways, but typically involves random variations in educational opportunity ranging from grossly inadequate to high quality. Racial, ethnic, and disability-based segregation also layer on top of this quality stratification, raising additional concerns.

On the whole, the stratification might be evidence of a number of different state constitutional violations. In states that guarantee a baseline of qualitative educational

<sup>356</sup> See generally Black, *supra* note 21 (detailing a prima facie school funding case and the causal analysis).

<sup>357</sup> See *supra* notes and accompanying text.

<sup>358</sup> LEACHMAN, *supra* note 174.

<sup>359</sup> See *supra* notes and accompanying text.

opportunity, stratification may eviscerate that baseline for students at the bottom. Take the worst-case example of charter closures in Broward. The bottom fell so far that the state itself closed several schools.<sup>360</sup> But what of the charters that were just short of closure or those that evidence reveals are performing substantially below their local traditional public school counterparts? The state policies that created and incentivized these schools pushed students into even worse situations and represent evidence that the state is simply no longer ensuring a baseline of educational opportunity.

The state might defend on the grounds that students are exercising choice in the educational opportunities,<sup>361</sup> but the fact remains that the state is not offering all students choices that include access to quality education. A system of state-run inadequate public schools has simply been replaced by a decentralized mix of public and private schools that are inadequate. The latter, however, is arguably more problematic because the state has attempted to distance itself from the problem and left students to fend for themselves.

In states with uniformity and strong equality guarantees, stratification creates even more obvious violations. Whatever the failings of the traditional public education system, the transition to a system of stratified opportunities exacerbates the failings. Stratified opportunity necessarily entails more inequality among students, with some falling even further below baseline opportunity and a select few rising well above. In the same respect, such a system becomes less uniform, with educational opportunity resting more on the luck of the draw than any state guarantee. To be clear, however, this is not a facial uniformity challenge as seen in prior litigation. Rather, the theory here is that, as a practical matter, the state has exacerbated inequality and made schools less uniform.

School segregation, unfortunately, can layer on top of this stratification in educational opportunity. Not only does the stratification generally deprive students of adequate educational opportunities, data suggests it primarily deprives students in increasingly segregated schools of that opportunity.<sup>362</sup> Moreover, the segregation itself further intensifies the inadequacy.

Racial segregation, in particular, is educationally devastating because it is so often accompanied by socio-economic segregation.<sup>363</sup> Research indicates that high-poverty schools depress the academic achievement of all students who attend those schools, regardless of their individual race or class.<sup>364</sup> In at least five major aspects—access to

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<sup>360</sup> Florida's Failed Charter Schools, *supra* note 224.

<sup>361</sup> *See, e.g.,* Scott B. v. Board of Trustees, 217 Cal. App. 4th 117 (Cal. App. 4th Dist. 2013) (reasoning student was not entitled to due process because charter was a school of choice). The general idea of forfeiture has also been used in school discipline cases. *See, e.g.,* Doe v. Superintendent, 653 N.E.2d 1088, 1096 (Mass. 1995); *In re RM*, 2004 WY 162, ¶ 19, 102 P.3d 868, 874 (Wyo. 2004); *See also* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 207 (1995) (extolling a major virtue of choice as being making individuals responsible for their own education).

<sup>362</sup> ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. & EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 14 (2008).

<sup>363</sup> *See id.*

<sup>364</sup> *See* JAMES S. COLEMAN ET AL., DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 47–76 (2001); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality*:

quality curriculum, access to qualified teachers, access to high-achieving peer groups, graduation rates, access to later employment and higher education—predominantly poor and minority schools cause harm or deliver inferior educational opportunities to students.<sup>365</sup> These problems are not ones money alone can easily fix.<sup>366</sup> They are the product of segregation itself.

Although the number of cases challenging segregation under state education clauses are limited, existing precedent is favorable. Most notably, the Connecticut Supreme Court held that racial segregation in public schools, even if unintentional, produces harms that deprive students of their right to education. The New Jersey and California Supreme Court have similarly recognized that segregation can violate students' education rights.<sup>367</sup>

This precedent, along with the general principles of uniformity and equality developed in numerous other cases, suggest that the segregative trends developing in places like Newark, Minneapolis, and North Carolina violate state education clauses. The self-sorting and stratification that choice programs allow are a direct cause of segregation in these locations. The segregation itself may violate constitutions in some states. In others, segregation causes inadequacy and inequality that violates students' general education rights.

#### CONCLUSION

Charter schools and vouchers are here to stay. Courts and public policy have made that clear. Polemic arguments against their existence do a disservice to both choice programs and traditional public education. Key questions regarding whether any constitutional principles govern their co-existence get lost in the polemics. Courts and legal scholars have, likewise, failed to provide meaningful guidance on how best to implement choice.

This Article fills that void, focusing on how choice programs impact particular school districts and the constitutional principles that apply. In particular, states' constitutional duty to deliver adequate and equal educational opportunities in public schools creates two specific limits. States cannot preference private choice over public education, nor can states create choice programs that, as a practical matter, undermine educational opportunities in traditional public schools.

The time for courts to formally adopt these principles is now. Choice programs are rapidly expanding, imposing even larger harms on public schools, and set to grow even

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*A Multi-level Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. RECORD 1201, 1201–02 (2010); Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L.J. 157, 157 (2006).

<sup>365</sup> Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 405–09 (2012).

<sup>366</sup> See *id.*; Jane L. David, *Teacher Recruitment Incentives*, EDUC. LEADERSHIP, Apr. 2008, at 84, 85–86; Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUC. 44, 65 (2005); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 35–37 (2008) (finding that student body composition drives teacher preferences); Ryan, *supra* note 238.

<sup>367</sup> See *Jenkins v. Morris Tp. School Dist.*, 279 A.2d 619, 627 (N.J. 1971); *Booker v. Bd. of Educ. of City of Plainfield, Union Cty.*, 212 A.2d 1, 6 (N.J. 1965); *Crawford v. Bd. of Educ.*, 551 P.2d 28, 39 (Cal. 1976) (In Bank) (mandating that the state “attempt to alleviate segregated education and its harmful consequences, even if such segregation results from the application of a facially neutral state policy”).

## PREFERENCING EDUCATIONAL CHOICE

more under new federal proposals. Without constitutional limits, education may soon enter a new paradigm in which public education is no longer a guarantee in every community.